

PUBLIC VERSION

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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| |) | |
| Crown Castle Fiber LLC |) | |
| <i>Complainant,</i> |) | |
| |) | Proceeding Number 19-169 |
| v. |) | Bureau ID Number EB-19-MD-004 |
| |) | |
| Commonwealth Edison Company, |) | |
| <i>Defendant</i> |) | |
| _____ |) | |

TO: ENFORCEMENT BUREAU

**COMMONWEALTH EDISON COMPANY'S ANSWER
TO THE POLE ATTACHMENT COMPLAINT FOR DENIAL OF ACCESS
OF CROWN CASTLE FIBER LLC**

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Dated: July 22, 2019

SUMMARY

Crown Castle's complaint, seeking an extraordinary level of refunds over an extended period, falters for both threshold and operational reasons. Notwithstanding the Bureau's Order, ComEd believes that the Illinois Commerce Commission has jurisdiction over this Complaint, and indeed Crown Castle itself acted for many years as if the state controlled these matters. Even if the FCC process applies, Crown Castle has failed to establish that it is a telecommunications provider with rights under the statute, particularly with respect to its wireless attachments. Crown Castle has also failed to demonstrate its rights under the agreements that it cites. At the operational level, Crown Castle's claims of denied access to "red tag" poles applies the wrong NESC technical standards, is based on mistaken facts, and reads FCC rules too broadly. In reality, ComEd has accommodated all attacher requests, which have become increasingly numerous, consistent with sound engineering and overall legal standards. In all events, even if the FCC finds that Crown Castle's complaint has some merit, the Commission's remedies can only be prospective.

Preserving its arguments for potential appeal of the July 15 Bureau Order, ComEd incorporates its Motion to Dismiss filed earlier in this proceeding as support that the Commission lacks jurisdiction to hear this Complaint.

Crown Castle's wireless antenna attachments are unregulated. The Communications Act, the Commission, and the courts recognize that an attaching entity like Crown Castle should be treated as a telecommunications carrier only to the extent that it is providing common carrier telecommunications service. Crown Castle has repeatedly admitted that it is not providing any telecommunications service using the antennas that it is attaching to ComEd's poles. As such,

PUBLIC VERSION

these antenna attachments by Crown Castle are unregulated attachments subject to negotiated rates, terms and conditions, not regulated rates, terms and conditions.

Moreover, Crown Castle has failed to establish a *prima facie* case that it is using ComEd's poles to provide any telecommunications service at all, either wireline or wireless. The Complaint provides no evidence of any tariff on file in Illinois authorizing it to provide telecommunication services, and the Certificate it produced does not cover all of the relevant Crown Castle entities. Crown Castle therefore has failed to establish that it is seeking attachment rights as a telecommunications carrier and not as an unregulated private carrier for the attachments at issue in this Complaint.

Crown Castle also does not appear to be the proper entity to be filing a complaint, as Crown Castle has not established that it is the entity properly entitled to enforce the three pole attachment agreements at issue in this proceeding.

If the Commission does not dismiss the Complaint for other reasons, any relief should be prospective only. Even assuming that the Commission has jurisdiction over this Complaint as the July 15 Bureau Order concludes, ComEd and Crown Castle both proceeded for many years with the understanding that the pole attachments at issue were regulated by the Illinois Commerce Commission (ICC) and not subject to the rules and regulations of the FCC. Indeed, the Commission's own pronouncements in the April 2011 Pole Attachment Order and in Section 1.1405(a) of the rules represented that Illinois had preempted FCC jurisdiction over all pole attachments in that State. In addition, Supreme Court and Commission precedent recognizes the fundamental principle that administrative rules generally should not have retroactive effect, and retroactive application would be unfair in the absence of fair notice. The Commission's new rulings in the OTMR Order are similarly subject to these retroactive rulemaking restrictions.

Finally, whatever the case, the applicable statute of limitations in Illinois is two years, establishing the limit on refunds.

The “red tagged” poles that Crown Castle references in this proceeding do not qualify as “red tagged” poles as defined by the Commission. The OTMR Order defines a “red tagged” pole as one that is “found to be non-compliant with safety standards,” but the poles at issue in this proceeding do not violate any safety standards as Crown Castle suggests. As a result, the OTMR Order rulings applicable to “red tagged” poles do not apply, and Crown Castle’s legal conclusions based on these OTMR Order rulings have no merit.

Instead, any pole which upon inspection is found to present a danger to life or property is promptly repaired, disconnected or isolated, in accordance with NESC Rule 214.A.5 in effect in Illinois. Any other pole which upon inspection is found to have deteriorated below original strength by more than 33% is “red tagged” and deemed a “reject pole,” consistent with Table 261-1A of the 2002 NESC in effect in Illinois. Poles exhibiting this deterioration or any other defect in the course of inspection are recorded, and such records of defects are maintained until the defects are corrected, in accordance with NESC Rule 214.A.4 in effect in Illinois. This activity is in accordance with the NESC, not a violation of the NESC.

ComEd has not denied Crown Castle access to red tagged poles, but instead allows Crown Castle to gain access by paying to replace or, if appropriate, reinforce the pole. ComEd’s policies are neither unreasonable nor unlawful and must factor in considerations related to reliability, resiliency, and planning, the safety of all those working on its poles, and the safe and efficient operation of its pole plant as a whole.

Crown Castle’s Complaint relies on the Declaration of its expert Nelson Bingel. Mr. Bingel’s Declaration in turn is based on his analysis of the wrong edition of the NESC, which

PUBLIC VERSION

contains different language than the one in effect in Illinois. Making matters worse, his opinion (and Crown Castle's Complaint) is based on the incorrect factual assumption that the red-tagged "Priority" poles classified as such by ComEd are poles that belong in the category of presenting a "danger to life or property" under the NESC and so must be fixed "promptly." As a result, the opinions expressed in his Declaration are misdirected and uninformed, as are the arguments of Crown Castle which rely on them. The Commission should disregard Mr. Bingel's opinion (and those of Crown Castle) for another reason: Mr. Bingel has never been responsible for running a major metropolitan utility. Questions of reasonableness or appropriateness are best left to those who are responsible not only for poles but for the remainder of the utility's urban infrastructure including cables, manholes, vaults, wires, and conduits, all of which demand resources to support an evolving grid of the future.

Because Crown Castle can access red tagged poles prior to the end of the useful life of those poles, and because capacity is being expanded to accommodate Crown Castle's proposed attachments, the pole replacement or reinforcement ComEd performs is for the benefit of Crown Castle, just as it would be for the benefit of any other entity, including ComEd, which might seek to install new facilities on a red tagged pole and must, like Crown Castle, pay the cost of the pole replacement or reinforcement.

The poles at issue in this proceeding are at full capacity based on ComEd's engineering and reliability standards, which ComEd imposes on all attachers including itself in a nondiscriminatory manner. For new attachments to be accommodated, ComEd must expand capacity by installing a replacement pole (or by reinforcing the existing pole, if appropriate). In most cases, therefore, Crown Castle is asking that the Commission require ComEd to expand capacity to accommodate Crown Castle's attachment requests, which the Commission cannot

require utilities to do.

The determination whether to replace or reinforce a pole is a design decision driven by the location of the decay, the size of the decay, the location of risers, the direction of the load, the extent of electric facilities, the height of the banding, whether the pole top is decayed, whether there are woodpecker holes, and dozens of other factors. A large part of the reason Crown Castle must replace the overwhelming majority of “red tag” poles rather than reinforce them is because two-thirds of the distribution poles in Chicago are three-phase poles, which carry a lot of electric load and which affect a large number of electric customers, and most of Crown Castle’s attachments are in Chicago and similarly population dense areas.

As for its requests to install “temporary” attachments, Crown Castle is trying to use a nonexistent provision of the NESC in Illinois to convince the Commission that ComEd should perform a pole loading study that Crown Castle believes few in the industry perform in order to allow Crown Castle to attach its facilities to poles that have been red tagged and for that reason should not carry additional load.

ComEd believes it has timely processed Crown Castle’s application for pole attachments given ComEd’s considerable constraints. Moreover, much of Crown Castle’s application processing timing data is incorrect and/or disregards relevant factors, including actions by Crown Castle itself. FCC make-ready deadlines and other rules have not been applied to Crown Castle’s attachments to ComEd’s poles in Illinois. The July 15 Bureau Order ruled that the FCC had jurisdiction over this Complaint, which has now caused ComEd to reexamine the applicability of FCC make-ready deadlines and other rules. Prior to that time, ComEd (and indeed Crown Castle) operated consistent with ICC jurisdiction, recognizing the ICC had jurisdiction.

TABLE OF CONTENTS

| | |
|--|------------|
| AFFIRMATIVE DEFENSES..... | 1 |
| A. The FCC Lacks Jurisdiction to Resolve This Complaint | 1 |
| B. Crown Castle’s Wireless Antenna Attachments Are Unregulated..... | 2 |
| C. The Complaint Should Also Be Dismissed Because Crown Castle Has Failed to Establish a <i>Prima Facie</i> Case That it is Providing Telecommunications Service on ComEd’s Poles..... | 6 |
| D. Crown Castle Does not Appear to be the Proper Entity to be Filing a Complaint | 11 |
| E. If the Commission Does Not Dismiss The Complaint For Other Reasons, Any Relief Should Be Prospective Only | 15 |
| 1. ComEd Reasonably Relied On The Preemption Certification of the State of Illinois And On Commission Rules In Believing That FCC Pole Attachment Rules Did Not Apply To the Attachments At Issue. | 15 |
| 2. Based On Legal And Equitable Principles Any Relief Must Be Prospective And Not Retroactive..... | 18 |
| 3. Retroactive Ratemaking Restrictions Similarly Apply to Any Request for Red-Tagged Pole Relief Prior to the Effective Date of the August 2018 OTMR Order | 21 |
| 4. The Applicable Statute of Limitations in Illinois is Two Years, Establishing the Limit on Refunds..... | 21 |
| II. RESPONSE TO COMPLAINT ALLEGATIONS..... | 24 |
| A. INTRODUCTION..... | 24 |
| B. PARTIES..... | 25 |
| C. JURISDICTION..... | 27 |
| D. BACKGROUND AND FACTS..... | 32 |
| 1. ComEd’s Lawful Red Tag Practice..... | 34 |
| 2. ComEd’s Processing of Attachment Permit Applications | 66 |
| E. DISCUSSION | 78 |
| 1. Crown Castle’s Requests to Attach to “Red Tag” Poles | 78 |
| 2. Crown Castle Must Pay to Replace or Reinforce “Red Tag” Poles | 109 |
| 3. ComEd Has Provided Crown Castle Sufficient Information Regarding its “Red Tag” Practice | 120 |
| 4. ComEd Has Not Unreasonably Delayed Pre-Construction Surveys or Issuance of Make-Ready Estimates | 122 |
| F. ATTEMPTS TO RESOLVE ALL DISPUTES | 128 |
| III. INFORMATION DESIGNATION..... | 131 |
| IV. CONCLUSION..... | 133 |

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**COMMONWEALTH EDISON COMPANY’S ANSWER
TO THE POLE ATTACHMENT COMPLAINT FOR DENIAL OF ACCESS
OF CROWN CASTLE FIBER LLC**

Defendant Commonwealth Edison Company (“ComEd”), pursuant to the Notice of Formal Complaint issued on June 21, 2019 by the FCC Enforcement Bureau in this proceeding and pursuant to Section 1.726 of the Commission’s Rules, 47 C.F.R. §1.726, submits the following Answer to Crown Castle Fiber LLC’s (“Crown Castle”) Access Complaint (the “Access Complaint.”)

In support of its Answer, ComEd respectfully submits the following Affirmative Defenses, which are followed by ComEd’s paragraph-by-paragraph responses to Crown Castle’s allegations.

I. AFFIRMATIVE DEFENSES

A. The FCC Lacks Jurisdiction to Resolve This Complaint

1. ComEd’s Motion to Dismiss, which was filed in the above-captioned proceeding on June 28, 2019, is attached hereto at Attachment A. The arguments contained therein are

incorporated herein by reference. As explained in the Motion to Dismiss, (1) the ICC’s certification was effectively made; (2) the FCC’s list of certified states, which is Appendix C to the April 2011 Pole Attachment Order, states that such certification “preempts the Commission from accepting pole attachment complaints under Subpart J of Part 1 of the Rules,” and (3) Section 1.1405 of the Commission’s rules requires that Illinois’s certification be “conclusive proof” the Commission lacks jurisdiction. For these and the other reasons stated in ComEd’s Motion to Dismiss, the FCC should dismiss Crown Castle’s Complaint for lack of jurisdiction.¹

B. Crown Castle’s Wireless Antenna Attachments Are Unregulated

2. Crown Castle admits that it is not providing any telecommunications service using the antennas that it is attaching to ComEd’s poles. As such, these antenna attachments by Crown Castle are unregulated attachments subject to negotiated rates, terms and conditions, not regulated rates, terms and conditions. As explained below, Crown Castle has failed to establish a prima facie case that it is using ComEd’s pole to provide any telecommunications service, and additional discovery might be required to make that determination. But regardless of whether Crown Castle is providing a wireline telecommunications service using the facilities attached to ComEd’s poles, Crown Castle cannot recover for any of its wireless attachments.

3. The federal Pole Attachment Act, which is part of the Communications Act, provides attachment rights to two types of entities: cable television systems and providers of telecommunications service.²

¹ ComEd understands the Enforcement Bureau recently denied ComEd’s Motion to Dismiss. *See Crown Castle Fiber LLC v. Commonwealth Edison Company*, DA 19-640 (rel. July 15, 2019) (“July 15 Bureau Order”). ComEd nevertheless wishes to preserve these arguments for potential appeal to the full Commission.

² 47 U.S.C. §224(a)(4). “The term ‘pole attachment’ means any attachment by a cable television system or provider of telecommunications service....” *Id.*

4. Crown Castle makes no claim to be a “cable television system,” but it does claim to qualify as a “provider of telecommunications service.” The term “telecommunications service” is defined as “the offering of telecommunications for a fee directly to the public”³ In turn, “telecommunications” is defined as “the transmission, between or among points specified by the user, of information of the user’s choosing, without change in the form or content of the information as sent and received.”⁴

5. But Crown Castle, by its own admission, does not offer wireless telecommunications and does not transmit wireless signals. Instead, the antennas that Crown Castle has installed on ComEd’s poles are being used by other entities who themselves are the entities that offer wireless communications service and that transmit the wireless signals. Crown Castle does not operate these antennas at all, and does not use them to provide any telecommunications service, because Crown Castle’s service is a wireline service not a wireless service.

6. Crown Castle (through its predecessors and affiliates) has repeatedly and consistently argued before this Commission and before state commissions that its RF transport service (at issue in this Complaint) is not a wireless telecommunications service and that it is not a wireless telecommunications provider. Significantly, in a petition for declaratory ruling that was ultimately withdrawn, NextG (a predecessor of Crown Castle, and through Crown Castle’s counsel in this proceeding) specifically asked the Commission to declare that the service it provides via DAS networks and other “Small-Cell Solutions” was not a wireless, CMRS service.⁵ In support of its request, NG represented that it “does not provide any radio

³ 47 U.S.C. §153(46).

⁴ *Id.* at §153(43).

⁵ Petition For Declaratory Ruling, WT Docket No. 12-37, December 21, 2011, at p. 1 (“Petition”).

communication service and that NextG's service is provided entirely over fiber optic facilities between fixed points..."⁶

7. Likewise, in a recent court proceeding in Pennsylvania, Crown Castle NG East LLC and Pennsylvania-CLE LLC (wholly-owned subsidiaries in the Crown Castle family) represented that they do not provide mobile wireless service but that the "DAS networks provide only underlying transport services via its fiber optic lines to WSPs" or Wireless Service Providers.⁷ The Crown Castle entities also contended that simply because Wireless Service Providers "incorporate Crown Castle's transport service as a component part of their provision of mobile service does not convert Crown Castle's RF transport service into a mobile service."⁸ Industry stakeholders agreed that DAS networks "do not offer mobile or wireless services regulated by the Federal Communications Commission (FCC)."⁹ Ultimately, the Pennsylvania Court determined that Crown Castle is not a wireless service provider.

8. In describing RF transport service, Crown Castle's predecessor, NextG, represented to this Commission that "the carrier customer's Base Station equipment includes radio equipment that ultimately controls the radio frequency transmission."¹⁰ "[A]ll radio transmissions and wireless service are controlled and provided by NextG's carrier customers through the carrier customer's equipment located at the Base Station."¹¹ This is true for communications in both directions: "NextG does not provide or control radio transmissions between the Node and a carrier customer's subscriber's mobile device."¹² "Without the radio

⁶ Petition at 1.

⁷ *Crown Castle NG East LLC v. Pa PUC.*, 188 A. 3d 617, 628 (2018).

⁸ *Id.*

⁹ *Id.* at 622.

¹⁰ *NextG Networks of California Reply Comments In Support Of Petition For Declaratory Ruling*, WT Docket No. 12-37, p.3 ("Reply Comments").

¹¹ Reply Comments at p.3.

¹² *Id.*

frequency signal, which is generated and controlled by NextG's wireless carrier customers, the antennae are no more capable of providing service than they would be boxed up in a warehouse.”¹³

10. Crown Castle therefore admits that it installs antennas that are incapable of providing any telecommunications service until Crown Castle's wireless customers come along and use those antennas to themselves provide a service.

11. Although questions exist whether Crown Castle is providing any telecommunications service at all using any of Crown Castle's attachments, it is a fact verified by Crown Castle itself that Crown Castle is not using the antennas it installs to provide service.

12. The Communications Act, the Commission, and the courts recognize that an attaching entity like Crown Castle should be treated as telecommunications carriers only to the extent that it is providing common carrier telecommunications service. The Communications Act states: “A telecommunications carrier shall be treated as a common carrier under this Act only to the extent that it is engaged in providing telecommunications services.”¹⁴ As the D.C. Circuit explained: “A service provider is to be treated as a common carrier for the telecommunications services it provides, but it cannot be treated as a common carrier with respect to other, non-telecommunications services it may offer, including information services.”¹⁵ This ruling affirms the longstanding precedent that “one may be a common carrier with regard to some activities but not others.”¹⁶

¹³ Reply Comments at p.6.

¹⁴ 47 U.S.C. § 153 (44).

¹⁵ *Verizon v. Federal Communications Commission*, 740 F.3d 623, 650 (D.C. Cir. 2014), quoting *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, Declaratory Ruling, 22 FCC Rcd 5901, at ¶50 (2007) (“Wireless Broadband Order”).

¹⁶ *Id.* at 653 (D.C. Cir. 2014) (quoting *Nat'l Ass'n. of Regulatory Util. Comm'rs v. Fed. Communications Commission*, 533 F.2d 601, 608 (D.C. Cir. 1976) (“NARUC II”); see also *Southwestern Bell Tel. Co. v. FCC*, 19

13. In accordance with these statutory, judicial and FCC rulings, Crown Castle is not a telecommunications carrier to the extent it is not providing telecommunications service using the antennas it is installing. As a result, even if the FCC had jurisdiction over this Complaint, and even if Crown Castle were able to prove it is a telecommunications carrier with respect to its wireline attachments on ComEd's poles, Crown Castle, by its own admission would not have federal Pole Attachment Act rights to attach its wireless antennas to ComEd's poles.¹⁷

14. Since Crown Castle's wireless attachments are unregulated, ComEd's negotiated wireless attachments are not subject to FCC regulation, including FCC make-ready deadlines.

C. The Complaint Should Also Be Dismissed Because Crown Castle Has Failed to Establish a *Prima Facie* Case That it is Providing Telecommunications Service on ComEd's Poles

15. Even more broadly, Crown Castle has not established that it is a telecommunications provider in any regard, and the Complaint should be dismissed for this threshold failure. The Commission considers a certificate and tariff from the State to be presumptive evidence that an entity is a telecommunications provider entitled to federal pole attachment access rights.¹⁸ Crown Castle fails this basic test.

16. Crown Castle claims to have federal pole attachment rights as a telecommunications carrier because it has a certificate to provide telecommunications service on file with the Illinois Commerce Commission ("ICC"). Attachment A to this Complaint is a

F.3d 1475, 1481 (D.C. Cir. 1994) (explaining that "whether an entity in a given case is to be considered a common carrier or a private carrier turns on the particular practice under surveillance" and that the FCC "is not at liberty to subject [an] entity to regulation as a common carrier" if the entity is acting as a private carrier for a particular service").

¹⁷ This is not a case covered by *NCTA v. Gulf Power Co.*, 534 U.S. 327 (2002), and related FCC precedents, for Crown Castle is not providing any commingled services over these wireless attachments.

¹⁸ *Fiber Technologies Networks, L.L.C. v. North Pittsburgh Telephone Co.*, Memorandum Opinion and Order, 22 FCC Rcd 3392 at ¶16 (Enf. Bur. 2007); *Salsgiver Telecom, Inc. v. North Pittsburgh Telephone Co.*, Memorandum Opinion and Order, 22 FCC Rcd 9285 at ¶12 (Enf. Bur. 2007).

Declaration with Exhibits asserting that Crown Castle Fiber LLC has such a valid certificate. At Exhibit 5 to Attachment A, a cover letter and footnote to the cover letter, along with the documents attached to Exhibit 5, attempt to explain that Crown Castle Fiber LLC has had a valid certificate since the attached RCN order was issued in 2007 -and the only development that happened since 2007 was that “RCN New York Communications, LLC” changed its name to “Sidera Networks d/b/a Lighttower Fiber Networks” (the entity that signed one of the three the pole attachment agreements), which changed its name to “Lighttower Fiber Networks II, LLC”, which then changed its name to the complainant, “Crown Castle Fiber LLC.”¹⁹

17. If the Commission were to accept this explanation, then Crown Castle Fiber LLC will have only very limited rights. That is because Crown Castle will have only shown that it is the successor to the Sidera entity that signed one of the three pole attachment agreements at issue in this proceeding, and that the entity installing the relatively few attachments subject to that agreement has had a certificate in place since 2007.

18. If the FCC were to decide it had jurisdiction over this Complaint, then such a finding by the Commission would support Crown Castle Fiber LLC’s claim to FCC jurisdiction over the relatively small number of poles associated with the Sidera agreement.

19. Crown Castle provides no such certificate and analysis with respect to the other two agreements that are subject to this Complaint. The Attachment A Declaration and Exhibits indicate that several predecessors in interest to Crown Castle Fiber LLC also were authorized by the ICC to provide telecommunications service and then they merged into Crown Castle Fiber LLC. In its Declaration and Exhibits, Crown Castle further claims that

¹⁹ Letter from Asa J. Herald, Counsel for Crown Castle Fiber LLC, to Chief Clerk’s Office, Illinois Commerce Commission, (May 23, 2018), attached to Crown Castle Pole Attachment Complaint at Attachment A, Exhibit 5 (CCF000089).

these predecessors are themselves predecessors to the specified entities that entered into the agreements with ComEd.

20. But this analysis contains gaps that Crown Castle has not explained. Crown Castle explains that NextG Networks of Illinois, Inc. entered into a pole attachment agreement with ComEd on December 22, 2004.²⁰ Crown Castle also explains that an entity called Crown Castle NG Central LLC was acquired by Crown Castle Solutions Corp., and that Crown Castle NG Central LLC was consolidated into the complainant Crown Castle Fiber LLC on December 31, 2018.²¹ But Crown Castle does not provide any explanation as to how NextG Networks of Illinois, Inc. somehow might have become Crown Castle NG Central LLC, which then somehow became the complainant, Crown Castle Fiber LLC.

21. Similarly, Crown Castle explains that Sunesys, Inc. entered into a pole attachment agreement with ComEd on May 5, 2005, and that Sunesys, Inc. was later acquired by Crown Castle, but does not explain when Sunesys, Inc. was acquired by Crown Castle or whether there might have been some intermediate transactions leading up to that acquisition. Moreover, Crown Castle has not provided any evidence that either NextG Networks of Illinois, Inc., Crown Castle NG Central LLC, Sunesys, Inc., or any of the other as-yet unnamed intermediate entities were certificated by the ICC to provide telecommunications service, or whether such certificates were ever properly transferred from the predecessor companies to the intermediate companies, and finally to Crown Castle Fiber LLC.

22. Crown Castle accordingly has not provided any explanation as to why it should be entitled to federal pole attachment access rights under the NextG Agreement or the Sunesys Agreement. Crown Castle has not included with its Complaint any evidence that the

²⁰ Declaration of Rebecca Hussey, attached to Crown Castle Pole Attachment Complaint at ¶5 (CCF000003).

²¹ *Id.* at ¶¶ 8, 11 (CCF000003-CCF000004).

signatories to those agreements, NextG Networks of Illinois, Inc. and Sunesys, Inc., or any of the intermediate entities identified above or yet to be identified, were ever certificated by the ICC as telecommunications providers, or that any of these entities filed a tariff with the ICC. Accordingly, Crown Castle has failed to establish a *prima facie* case that it is a certificated telecommunications provider within the State of Illinois for its attachments made pursuant to the NextG and Sunesys pole attachment agreements with ComEd.

23. Even if it had provided certificates that were effective to cover the two entities which entered into these other two agreements, and certificates that were effective to cover all of the successor entities to the signatories to these agreements leading all the way up to the complainant Crown Castle Fiber LLC, Crown Castle has still failed to meet the *Fiber Technologies* and *Salsgiver* standards for establishing a *prima facie* case that it is a telecommunications carrier because Crown Castle's Complaint does not include or reference any tariff on file in Illinois to govern the services provided by Crown.

24. Crown Castle's website does point to a tariff in Illinois for its "legacy company" Sunesys.²² However, nowhere in the Sunesys tariff is there a description of "RF transport service." Nor is there any Illinois tariff on the website relating to NextG Networks or Lightower – the other two legacy companies with whom Com Ed entered into pole attachment agreements.

25. Without an applicable tariff, Crown Castle has failed to show it is providing its RF transport service as a telecommunications carrier. In fact, its most recent 10-K filed with the U.S. Securities and Exchange Commission indicates that Crown Castle is providing its services with individual terms and conditions on a private carrier basis and not on a non-discriminatory common carrier basis, which is a requirement to qualify as a telecommunications service: "Our

²² Crown Castle Fiber LLC, Regulatory Status (Jul. 22, 2019), <https://fiber.crowncastle.com/regulatory-status>.

core business is providing access, including space or capacity, to our shared communications infrastructure via long term contracts in various forms, including lease, license, sublease and service agreements.”²³

26. As explained above, the Communications Act, the courts and the Commission have recognized that a telecommunications carrier should be treated as a telecommunications carrier only to the extent that it is providing common carrier telecommunications.²⁴ In the pole attachment context, in its *Fiber Technologies* and *Salsgiver* orders, the Commission acknowledged that an entity recognized as a telecommunications carrier for some pole attachments is not necessarily recognized as a telecommunications carrier for all attachments. For example, it is possible for a telecommunications provider to have federal attachment rights in one part of a state but not in other parts: “a state might authorize an entity to provide telecommunications services only in some, but not all, portions of a state such that additional evidence of the entity’s status would be required to demonstrate a right of attachment in those non-certificated portions of the state.”²⁵

27. In sum, Crown Castle has failed to provide the certificate and tariff required to establish a *prima facie* case that it provides telecommunications service in Illinois, and has failed to establish that it is seeking attachment rights as a telecommunications carrier and not as a private carrier for the attachments at issue in this Complaint.

²³ Crown Castle International Corp., Form 10-K For the Fiscal Year Ended Dec. 31, 2018 at p.1, attached hereto at Attachment B (“Crown Castle 10-K”).

²⁴ 47 U.S.C. § 153 (44).

²⁵ *Fiber Technologies Networks, L.L.C. v. North Pittsburgh Telephone Co.*, Memorandum Opinion and Order, 22 FCC Rcd 3392 at 3397, n.38 (Enf. Bur. 2007); *Salsgiver Telecom, Inc. v. North Pittsburgh Telephone Co.*, Memorandum Opinion and Order, 22 FCC Rcd 9285 at 9289, n.33 (Enf. Bur. 2007).

D. Crown Castle Does not Appear to be the Proper Entity to be Filing a Complaint

28. ComEd does not believe it has a written pole attachment agreement with Crown Castle because ComEd is unaware of any valid written notification of assignment of any of the pole attachment agreements with NextG, Sunesys, and Lightower, nor did ComEd provide any prior written consent to any such assignments.

29. The pole attachment agreements entered into between ComEd and NextG, Sunesys, and Lightower each contain assignment provisions. The NextG agreement dated December 22, 2004 states:

[REDACTED]

[REDACTED]
[REDACTED]²⁶

The Sunesys agreement dated May 5, 2005 states:

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
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[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]²⁷

The Lighttower agreement dated July 26, 2013 states:

[REDACTED] [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

²⁶ Pole Attachment Agreement Distribution Infrastructure Between Commonwealth Edison Company and NextG Networks of Illinois, Inc., attached to Crown Castle Pole Attachment Complaint at Attachment A, Exhibit 1 (CCF000024).

²⁷ Pole Attachment Agreement, Commonwealth Edison Company & Sunesys, Inc., attached to Crown Castle Pole Attachment Complaint at Attachment A, Exhibit 2 (CCF000044-CCF000045).

[REDACTED]

30. ComEd is unaware of receiving any prior written notice of assignment from NextG, Sunesys, or Lighttower as required under the pole attachment agreements, nor has ComEd found any such notice of assignment after a diligent search of its records.²⁹ Moreover, ComEd did not provide any prior written consent to NextG, Sunesys, or Lighttower to assign any portion of the rights, privileges, and obligations under the agreements to Crown Castle.

31. Crown Castle has demonstrated in other transactions that it is fully capable of providing such a prior written notice. On July 7, 2016, Crown Castle NG Central LLC provided prior written notification to ComEd stating that Nextel West Corp. (“Sprint”) and ComEd were parties to a Pole Attachment Agreement, and that Sprint desired to transfer a number of attachments to Crown Castle.³⁰ Section 15 of the pole attachment agreement between Sprint and ComEd states:

[REDACTED]

²⁸ Pole Attachment Agreement Between Commonwealth Edison Company, Inc. and Sidera Networks, LLC d/b/a Lighttower Fiber Networks, attached to Crown Castle Pole Attachment Complaint at Attachment A, Exhibit 3 (CCF000066-CCF000067).

²⁹ Declaration of Joe Gilchrist at ¶4, attached hereto at Attachment C.

³⁰ Letter from Crown Castle NG Central LLC to M. Alonso, Real Estate Infrastructure Management, Commonwealth Edison Company (July 7, 2016), attached here to at Attachment D.

[REDACTED]

A copy of the notification from Crown Castle NG Central LLC is attached hereto at Attachment D. In its letter, Crown Castle NG Central LLC referenced the Pole Attachment Agreement between Sprint and ComEd and stated, “Please accept this letter as notification that (a) Sprint desires to transfer the following number of node attachments and fiber attachments identified on the attached Exhibit A (collectively, the “Attachments”) currently issued pursuant to the Existing Sprint Pole Attachment Agreement to Crown Castle.”³² Therefore, Crown Castle has encountered an assignment provision similar to the assignment provisions in the Sunesys, Lighttower, and NextG agreements and fully complied with the provision; as to the agreements at issue here, Crown Castle did not seek or obtain any prior written consent to any such assignment of those agreements.

32. Despite the fact that Crown Castle encountered a similar assignment provisions in the Sprint pole attachment agreement and complied with that provision by providing ComEd prior written notice of such an assignment, it failed to provide any valid written notification of assignment of the pole attachment agreements with NextG, Sunesys, and Lighttower and ComEd, and ComEd did not provide any prior written consent to any such assignments.

33. Accordingly, the Commission should dismiss the Complaint unless Crown Castle can establish that it is the entity properly entitled to enforce these agreements.

³¹ Letter from Crown Castle NG Central LLC to M. Alonso, Real Estate Infrastructure Management, Commonwealth Edison Company (July 7, 2016), attached hereto at Attachment D.

³² Pole Attachment Agreement Between Commonwealth Edison Company and Nextel West Corp., a Delaware corporation, d/b/a Nextel Communications, Sections 15, 15.1 (Mar. 26, 2003), attached hereto at Attachment D, Exhibit 1.

E. If the Commission Does Not Dismiss The Complaint For Other Reasons, Any Relief Should Be Prospective Only

34. Fundamental due process and fairness demand that any relief granted by the Commission pursuant to the Complaint must be prospective. Even assuming that the Commission has jurisdiction over this Complaint as the Enforcement Bureau recently ruled,³³ ComEd and Crown Castle both proceeded for many years with the understanding that the pole attachments at issue were regulated by the Illinois Commerce Commission (ICC) and not subject to the rules and regulations of the FCC. Indeed, the Commission's own pronouncements represented that Illinois had preempted FCC jurisdiction over all pole attachments in that State.

35. The Commission lacks statutory authority to impose its rules retroactively, and, even if it had the statutory authority, such an attempt would violate the "duty of fair notice" embedded in the due process clause and administrative law. It would also be inequitable and therefore arbitrary and capricious. Any such penalty would place an unfair burden on both ComEd and the customers of its utility services.

1. ComEd Reasonably Relied On The Preemption Certification of the State of Illinois And On Commission Rules In Believing That FCC Pole Attachment Rules Did Not Apply To the Attachments At Issue.

36. Under Section 224(c)(1) of the Act, 47 U.S.C. § 224 (c)(1), the Commission has no authority to regulate "pole attachments in any case where such matters are regulated by a State." In the April 2011 Pole Attachment Order, the Commission articulated this statutory provision as follows: "Under the 'reverse preemption' provision in section 224, states may certify that they regulate rates, terms, and conditions for pole attachments in their respective states; the Commission retains jurisdiction over pole attachments only in states that do not so

³³ *Crown Castle Fiber LLC v. Commonwealth Edison Company*, DA 19-640 (rel. July 15, 2019) ("July 15 Bureau Order").

certify.”³⁴ The Commission also represented that Illinois was one of the “States That Have Certified That They regulate Pole Attachments.”³⁵ In that document, the Commission states: “Certification by a state preempts the Commission from accepting pole attachment complaints.”³⁶ Nowhere in the Order does the Commission distinguish Illinois’ (or any other state’s) preemption of FCC regulation for cable attachments from telecommunications attachments.

37. The Commission’s pole attachment rules themselves state that state certification precludes Commission jurisdiction. Section 1.1405(a) states: “Such certificate shall be conclusive proof of lack of jurisdiction of this Commission” over pole attachments in the certifying state.³⁷

38. Because Appendix C to the April 2011 Pole Attachment Order and Section 1.1405(a) of the rules both conclusively state that the Illinois certification precludes FCC jurisdiction, ComEd was fully justified in relying on Illinois’ certification to conclude that FCC regulations do not apply.

39. In fact, both parties to the Complaint understood that the attachments were under the jurisdiction of the State of Illinois and not subject to FCC rules. On a number of occasions, both ComEd and Crown Castle approached the Illinois Commerce Commission in an attempt to resolve the dispute.³⁸

40. Until recently, it was always ComEd’s understanding that the ICC regulated all pole attachments in the State of Illinois. Based on developments which commenced in 2017,

³⁴ Implementation of Section 224 of the Act; A National Broadband Plan for Our Future, 26 FCC Rcd 5240 (2011) (2011 Order), at para. 7.

³⁵ 2011 Order, Appendix C.

³⁶ *Id.*

³⁷ 47 C.F.R. § 1.1405(a).

³⁸ See Declaration of Martin Montes at ¶¶4-10, attached hereto at Attachment E (hereinafter “Montes Declaration”).

ComEd believes representatives of Crown Castle also had the understanding that all pole attachments in Illinois were regulated by the ICC. In 2017, the dispute arose between Crown Castle and ComEd regarding fiber and wireless attachments to ComEd poles. In October 2017, ComEd received a telephone call from the ICC, requesting a time to meet with ComEd representatives to discuss ComEd's third-party attachment application process and fees. Representatives of the ICC indicated they had just concluded a meeting with representatives from Crown Castle and its respective attorneys regarding ComEd's third party application process and fees, at which Crown Castle raised concerns with the ICC regarding the timeliness of ComEd's application process, as well as the fees ComEd charged. Thereafter, at the request of the ICC, on October 31, 2017, ComEd representatives met with the ICC to discuss the concerns raised by Crown Castle. On January 22, 2018, ComEd representatives had a follow-up meeting with the ICC. ComEd representatives provided an update on the progress made in addressing the issues raised by Crown Castle. Then, on information and belief, later in January 2018 Crown Castle representatives had a separate follow-up meeting with the ICC to discuss their issues related including wireless attachment fees, red tag pole replacement issues and timing under the application process.³⁹

41. Not until October 25, 2018, did the Illinois Commerce Commission adopt the letter to the FCC stating that it does not regulate "attachments by telecommunications companies to poles owned by electric utilities."⁴⁰ Prior to the adoption of this letter, neither the parties nor the FCC had reason to believe that FCC rules and regulations would apply to the pole attachments at issue. And at odds with this Illinois letter, both the April 2011 Pole Attachment

³⁹ Montes Declaration at ¶¶4-10.

⁴⁰ Letter from ICC Chairman Brien J. Sheahan dated October 25, 2018, attached to Crown Castle Pole Attachment Complaint at Attachment B (CCF000117-CCF000118).

Order at Appendix C and Section 1.1405(a) of the Commission’s rules both conclusively state that Illinois’s earlier certification precludes FCC jurisdiction.

42. For its part, the July 15 Bureau Order concluded that the original “1985 Certification” from Illinois standing alone did not provide sufficient notice that Illinois lacked jurisdiction. Rather, the Bureau found that “collectively” the initial certification and the October 2018 notice expressed the ICC’s position that it “has not exercised preemption authority over telecommunications attachments to electric utilities.”⁴¹ In other words, not until now has ComEd had any notice from the Commission that FCC rules would apply to the pole attachments at issue.

2. Based On Legal And Equitable Principles Any Relief Must Be Prospective And Not Retroactive.

43. The Commission has no statutory authority to impose retroactive rates, and any such attempt would be unconstitutional, inequitable, and arbitrary and capricious.

44. Section 224 does not authorize retroactive ratemaking. Under Supreme Court precedent “retroactivity is not favored in the law.”⁴² “[C]ongressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result.”⁴³ The Commission has recognized this fundamental principle stating, “[a]s a general rule, in the absence of statutory authority, rules adopted pursuant to a rulemaking proceeding may only be applied prospectively.”⁴⁴ Nothing in the Pole Attachment Act allows for the retroactive application of rules and the Commission has previously rejected retroactive

⁴¹ *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1998).

⁴² *Id.*

⁴³ *Id.*

⁴⁴ Letter from Carol E. Matthey, Deputy Chief, Wireline Competition Bureau, Federal Communications Commission, to Richard A. Belden, Chief Operating Officer, Interim chief Executive Officer, Universal Service Administrative Company re WC Docket Nos. 10-90, 05-337 and 06-122; CC Docket No. 96-45, DA 14-661 (May 2, 2014) (*citing Bowen*, 488 U.S. at 208).

application of its pole attachment rates.⁴⁵ It has no lawful basis to apply its pole attachment rules retroactively in the current case.

45. Retroactive application of FCC rules would also offend the duty of fair notice. Because ComEd had no notice from the Commission that it would assert jurisdiction to accept Crown Castle's Complaint and apply FCC pole attachment rules until the July 15 Bureau Order asserting FCC jurisdiction to review the Complaint, and because both the April 2011 Pole Attachment Order and Section 1.1405(a) of the rules both indicated the FCC did not have jurisdiction, ComEd relied in good faith on the Illinois Certification and the pronouncements from the Commission that Illinois law applied to all Illinois pole attachments.

46. Constitutional considerations of due process require that regulations be implemented only after an agency provides fair notice of the regulations.⁴⁶ The Commission cannot simply substitute which pole attachment rules apply and then retroactively apply those rules to past conduct. Such a decision would amount to an unlawful retroactive order in violation the due process clause and the Administrative Procedures Act.⁴⁷

47. "[A] fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required."⁴⁸ As the D.C. Circuit has emphasized to the Commission, "[t]raditional concepts of due process incorporated into administrative law preclude an agency from penalizing a private party for violating a rule

⁴⁵ *Georgia Power Co. v. Teleport Communications Atlanta, Inc.*, 346 F.3d 1033, 1041 (11th Cir. 2003) (The Court noted that the FCC disavowed the Cable Service Bureau's retroactive application of the presumptive averages of the number of attachers, but upheld the FCC's adoption of those averages on separate grounds) (citing *Teleport Communications Atlanta, Inc. v. Georgia Power Co.*, Order On Review, 17 FCC Rcd 19859 2008, at para ¶ 20 (2002)).

⁴⁶ U.S. CONST. AMEND V ("No person shall be ... deprived of life, liberty, or property, without due process of law.").

⁴⁷ 5 U.S.C. §551.

⁴⁸ *FCC et al v. Fox Television Stations, Inc. et al*, 132 S. Ct. 2307, 2317 (2012) (citing *Connally v. General Constr. Co.*, 269 U.S. 385 (1926) (In *Fox*, the Court overturned FCC fines because the broad language used by the Commission to justify its enforcement did not constitute fair notice that a fleeting expletive could be "actionably indecent.")).

without first providing adequate notice of the substance of the rule.”⁴⁹ The D.C. Circuit has also held that “elementary fairness compels clarity in the notice of the material required as a condition for consideration.”⁵⁰ This “requirement of clarity in regulation is essential to the protections provided by the Due Process Clause of the Fifth Amendment.”⁵¹ And, where fair notice is not given, an agency may not impose any kind of “penalty” including “the expenditure of significant amounts of money.” *United States v. Chrysler Corp.*, 158 F.3d 1350, 1354-44 (D.C. Cir. 1998); see also *Fox II*, 132 S. Ct. at 2318-19 (finding that, in addition to fines, any “legal consequences” or “reputational injury” from an adverse agency action is sufficient to trigger the due process requirement of fair notice). In this situation, ComEd had no opportunity to comply with Commission pole attachment regulations where they were not clearly applied by the Commission to the subject Illinois poles.

48. Moreover, retroactive relief would be unfair and unduly burdensome to both ComEd and its customers and therefore arbitrary and capricious. As the record shows, ComEd proceeded in good faith in relying on FCC statements that the Illinois attachment rules applied. Significantly, ComEd was not alone in its understanding that Illinois law applied. Both ComEd and Crown Castle sought assistance from the ICC in resolving the current dispute.⁵² Not until the Bureau’s Order did the FCC make its position clear that it would assert jurisdiction to accept Crown Castle’s Complaint and apply FCC pole attachment rules. Until then, Crown Castle had no reasonable expectation that Commission’s pole attachment complaint process would apply. Under these circumstances, retroactive financial relief would result in an unwarranted windfall to

⁴⁹ *Satellite Broadcasting Co., Inc. v. FCC*, 824 F.2d 1, 4 (D.C. Cir. 1987) (holding that the FCC could not dismiss applications to operate microwave radio stations if it did not give clear notice of where there applications were to be filed).

⁵⁰ *Radio Athens, Inc. v. FCC*, 401 F.2d 398, 404 (D.C. Cir. 1968).

⁵¹ *FCC et al v. Fox Television Stations, Inc. et al*, 132 S. Ct. 2307, 2317 (2012) (citing *Connally v. General Constr. Co.*, 269 U.S. 385 (1926)).

⁵² Montes Declaration at ¶¶7-10.

Crown Castle, while unfairly burdening ComEd and its customers, without achieving any legitimate regulatory goal.

3. Retroactive Ratemaking Restrictions Similarly Apply to Any Request for Red-Tagged Pole Relief Prior to the Effective Date of the August 2018 OTMR Order

49. Crown Castle’s request for refunds of alleged overpayments for make-ready work associated with “red tagged” poles depends upon the Commission’s new rulings in its August 2018 OTMR Order,⁵³ particularly those new rulings with respect to red tagged poles.⁵⁴ Those new rulings in the OTMR Order, however, including those applicable to red tagged poles, did not become effective until May 20, 2019.⁵⁵ For the reasons stated above, it would be unlawful and inequitable to grant the retroactive refunds requested by Crown Castle’s Complaint, when its arguments for such refunds are based on an Order that did not become effective until May 20, 2019.

4. The Applicable Statute of Limitations in Illinois is Two Years, Establishing the Limit on Refunds

50. In addition to the foregoing, Crown Castle’s long delay in initiating a complaint means that the FCC should not award any refunds or payments, and certainly not the five-plus years that Crown is seeking. First, section 224 itself does not require the FCC to award any damages; the statute mentions as its only example of a remedy a “cease and desist order.” Second, the regulations similarly do not require refunds, saying that they will be awarded “if appropriate.” Third, although Crown has recently raised issues with ComEd, Crown Castle’s

⁵³ *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Third Report and Order and Declaratory Ruling, FCC 18-111 (Aug. 3, 2018) (“OTMR Order”).

⁵⁴ Pole Attachment Complaint for Denial of Access, *Crown Castle Fiber LLC v. Commonwealth Edison Company*, Proceeding Number 19-169, Bureau ID Number EB-19-MD-004 (filed Jun. 19, 2019) at ¶¶ 103, 105, 112-113, 121-124, 177 and 180 (hereinafter “Crown Castle Pole Attachment Complaint”).

⁵⁵ *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Final Rule, 84 FR 16412 (Apr. 19, 2019).

seeking more than five years' worth of refunds demonstrates unreasonable delay in bringing this complaint. In adopting the current form of 47 CFR § 1.1410, the FCC noted concerns that a rule permitting refunds from periods prior to the date of the complaint "creates an incentive for attaching entities to attempt to maximize their monetary recovery by waiting until shortly before the statute of limitations has expired to bring a dispute over rates to the Commission."⁵⁶ The Commission thought such delays would be unlikely,⁵⁷ but this appears to be such a case. The delay certainly is contrary to the Commission's "encourage[ment]" to "attachers to provide early notice to utilities of any alleged overcharges."⁵⁸

51. Finally, if the Commission were inclined to award a refund or payment, Crown Castle's request for five years is both unexplained and incorrect. The regulation allows an award "consistent with the applicable statute of limitations."⁵⁹ But, as the D.C. Circuit noted, the regulation "does not appear to specify what makes a limitations period applicable,"⁶⁰ and Crown provides no explanation for why it seeks refunds over the period that it describes. The federal Communications Act itself provides no applicable limitations period, as its provisions cover complaints against carriers,⁶¹ or Commission forfeiture actions, e.g., 47 U.S.C. § 503(b) – although it is worth noting that § 415(b), the most analogous provision because it governs private complaints against carriers, sets a two-year limitations period. Similarly, the most analogous provision of Illinois state law provides a two-year limitations period. In *Verizon Virginia v. Virginia Elec. Power Co.*⁶² the complaining party suggested a state contract-action statute of

⁵⁶ *Implementation of Section 224 of the Act, Report and Order and Order on Reconsideration*, 26 FCC Rcd. 5240, 5289 (¶ 111) (2011), *aff'd*, *American Elec. Power Serv. Corp. v. FCC*, 708 F.3d 183 (D.C. Cir. 2013).

⁵⁷ *Id.*

⁵⁸ *Id.* at 5290 (¶ 112).

⁵⁹ 47 C.F.R. § 1.1410(a)(3).

⁶⁰ *American Elec. Power*, 708 F.3d at 190.

⁶¹ *See* 47 U.S.C. § 415.

⁶² *Verizon Virginia v. Virginia Elec. Power Co.*, 32 FCC Rcd. 3750, 3764 & n.104 (2017) (Acting Chief, Market Disputes Resolution Division).

limitations and the defendant did “not dispute” that statute.⁶³ But this is not an action for breach of contract; it is an action contending that the rate is excessive or unjust and unreasonable.⁶⁴ The FCC regulation uses that exact language in the remedies regulation: “The refund or payment will normally be the difference between the amount paid under the unjust and/or unreasonable rate, term, or condition and the amount that would have been paid under the rate, term, or condition established by the Commission, plus interest, consistent with the applicable statute of limitations.”⁶⁵ The most analogous provision of state law is a provision of the Illinois Public Utilities Act, which provides for a two-year limitations period for cases in which a consumer alleges that any “public utility” has made an “excessive charge.”⁶⁶ Thus, even if Crown Castle were entitled to any refunds at all, Crown Castle, at most, might recover two years’ worth of refunds.

⁶³ *Id.*

⁶⁴ The FCC does not resolve contract disputes and is not in the business of enforcing existing agreements. These are matters the FCC leaves for courts to decide. *Listeners’ Guild, Inc. v. FCC*, 813 F.2d 465, 469 (D.C. Cir. 1987) (noting the FCC’s “longstanding policy of refusing to adjudicate private contract law questions for which a forum exists in the state courts”).

⁶⁵ 47 C.F.R. § 1.1410(a)(3).

⁶⁶ *See* 220 ILCS 5/9-252.

II. RESPONSE TO COMPLAINT ALLEGATIONS

A. INTRODUCTION

As explained in ComEd's answers to Paragraphs 1-4 below, ComEd has not denied Crown Castle access to ComEd's red tagged poles because Crown Castle, like other entities including ComEd, can gain access right away by paying the cost to replace or reinforce the poles. The FCC's make-ready rules have not been in effect in Illinois, but the July 15 Bureau Order asserting jurisdiction has caused ComEd to reexamine the applicability of the FCC make-ready deadlines. There is also no preexisting noncompliance on ComEd's red tagged poles that Crown Castle is being asked to fix.

Crown Castle 1: *Since 2017, Crown Castle has worked tirelessly, but unsuccessfully, to resolve pole attachment denial of access issues with ComEd.*

ComEd Answer: ComEd denies the allegations in this paragraph. Crown Castle has not been denied access to ComEd's poles.

Crown Castle 2: *First, ComEd refuses to permit Crown Castle to attach to poles that have been "red tagged" by ComEd unless and until Crown Castle first pays to replace or reinforce those red tagged poles, even though the conditions that caused the red tag status existed prior to and are unrelated to Crown Castle's proposed attachment. ComEd's denial of access to the red tagged poles and demands for payment as a condition of access have impacted applications for 1,202 poles and has already cost Crown Castle over \$14,000,000. ComEd's actions are directly contradicted by the Commission's One Touch Make-Ready Order and violate Section 224 of the Act.*

ComEd Answer: ComEd has not denied Crown Castle or other entities access to its red tagged poles because Crown Castle and other entities (including ComEd) can pay the cost of replacing or reinforcing those poles whenever they need access. For the reasons explained below, ComEd has not violated the OTMR Order or Section 224 of the Act.

Crown Castle 3: *Second, ComEd has consistently failed to comply with the Commission's timelines for surveys, make-ready estimates, and ultimate action on applications. Indeed, ComEd has failed to act in a timely manner under the Commission's Rules on applications for at least 10,000 poles.*

ComEd Answer: For the reasons explained in ComEd's Affirmative Defenses, ComEd denies that FCC make-ready deadlines and other rules have applied to Crown Castle's attachments to ComEd's poles in Illinois. The July 15 Bureau Order ruled that the FCC had jurisdiction over this Complaint, which has now caused ComEd to reexamine the applicability of FCC make-ready deadlines and other rules. Prior to that time, ComEd (and indeed Crown Castle) operated consistent with ICC jurisdiction, recognizing the ICC had jurisdiction.

Crown Castle 4: *By denying access unless and until Crown Castle pays to correct pre-existing non-compliance as a condition of accessing its poles, and in refusing to timely process Crown's applications, ComEd is in violation of Commission's rules, effectively denying Crown Castle access to ComEd's poles that are necessary to Crown Castle's provision of telecommunications services in violation of 47 U.S.C. § 224 and the Commission's Rules.*

ComEd Answer: ComEd has not denied Crown Castle or other entities access to its red tagged poles because Crown Castle and other entities (including ComEd) can pay the cost of replacing or reinforcing those poles whenever they need access. For the reasons explained below, there is no pre-existing non-compliance that Crown Castle is being asked to fix. For the reasons explained in ComEd's Affirmative Defenses, ComEd denies that FCC make-ready deadlines and other rules have applied to Crown Castle's attachments to ComEd's poles in Illinois. The July 15 Bureau Order ruled that the FCC had jurisdiction over this Complaint, which has now caused ComEd to reexamine the applicability of FCC make-ready deadlines and other rules. Prior to that time, ComEd (and indeed Crown Castle) operated consistent with ICC jurisdiction, recognizing the ICC had jurisdiction. For those reasons, Crown Castle denies that it has violated 47 U.S.C. § 224 or the Commission's Rules.

B. PARTIES

As explained in ComEd's answers to Paragraphs 5-10 below, Crown Castle is not providing any telecommunications services. Crown Castle has not provided evidence in its Complaint of a tariff on file in Illinois authorizing it to provide telecommunication services and the Certificate it produced does not cover all Crown Castle entities. Crown Castle does not offer wireless telecommunications and is not providing any telecommunications services using the antennas it is installing. Crown Castle attaches equipment that is wireless in nature, but Crown Castle itself is not operating that equipment at all, much less as a telecommunications carrier.

Crown Castle 5: *Complainant Crown Castle provides facilities-based, fiber-optic telecommunications services, including but not limited to telecommunications services to enterprise customers and telecommunications services over small cell and distributed antenna system networks, in the state of Illinois pursuant to a Certificate of Service Authority issued by the Illinois Commerce Commission.*

ComEd Answer: ComEd denies the allegations in Paragraph 5 of the Complaint. For the reasons stated in its Affirmative Defenses, ComEd denies that Crown Castle is providing any telecommunications services. Crown Castle has not provided evidence in its Complaint of a tariff on file in Illinois authorizing it to provide telecommunication services and the Certificate it produced does not cover all Crown Castle entities. Crown Castle does not offer wireless telecommunications and is not providing any telecommunications services using the antennas it is installing.

Crown Castle 6: *Crown Castle's mailing address is 1220 Augusta Drive, Suite 600, Houston, Texas 77057-2261.*

ComEd Answer: ComEd denies the allegations in Paragraph 6 of the Complaint for lack of knowledge or information sufficient to form a belief as to their truth.

Crown Castle 7: *Crown Castle provides telecommunications services to wireless carriers and to other large enterprise customers. When it provides telecommunications service to wireless carriers, Crown Castle typically does so via a service it calls "RF transport service." Crown Castle typically provides "RF transport service" using fiber optic lines to transport communications between remote wireless equipment called "Nodes" (consisting of antennas and related equipment) that are located on poles in the public rights of way and centralized hub facilities. Thus, Crown Castle attaches equipment that is "wireless" in nature, as well as equipment that is "wireline" in nature to ComEd poles.*

ComEd Answer: ComEd denies the allegations in Paragraph 7 of the Complaint. For the reasons stated in its Affirmative Defenses, ComEd denies that Crown Castle is providing any telecommunications services. Crown Castle has not provided evidence in its Complaint of a tariff on file in Illinois authorizing it to provide telecommunication services and the Certificate it produced does not cover all Crown Castle entities. Crown Castle has not provided evidence in its Complaint of a tariff on file in Illinois authorizing it to provide "RF transport service" as a telecommunication service. Crown Castle does not offer wireless telecommunications and does not provide any telecommunications services using the antennas it is installing. Crown Castle attaches equipment that is wireless in nature, but Crown Castle itself is not operating that equipment at all, much less as a telecommunications carrier. In fact, without a proper tariff or certification, and without proof that it is not offering service on a private, as opposed to common carriage, basis, all of the antennas and other equipment Crown Castle attaches to ComEd poles – whether wireless or wireline – is not done by a telecommunications carrier.

Crown Castle 8: *Respondent ComEd is an investor-owned electric utility in the business of providing electric transmission and distribution services. ComEd has a general business address of 440 South LaSalle Street, Chicago, IL 60605.*

ComEd Answer: ComEd admits the allegations in Paragraph 8 of the Complaint.

Crown Castle 9: *ComEd owns or controls poles in the State of Illinois that are used for, among other things, the attachment of wireline and wireless communication facilities.*

ComEd Answer: ComEd admits the allegations in Paragraph 9 of the Complaint

Crown Castle 10: *Crown Castle alleges, upon information and belief, that ComEd is not owned by any railroad, any person who is cooperatively organized, or any person owned by the Federal Government or any State.*

ComEd Answer: ComEd states that ComEd itself is not a railroad, a person who is

cooperatively organized, or a person owned by the Federal Government or any State.

C. JURISDICTION

As explained in ComEd's answers to Paragraphs 11-21 below, the FCC currently recognizes the State of Illinois as a state that has certified that it regulates pole attachments, and the rules provide that "[s]uch certificate shall be conclusive proof of lack of jurisdiction of this Commission" over a pole attachment complaint. 47 C.F.R. § 1.1405(a). All of the poles at issue in these proceedings are located in the State of Illinois, and the Illinois Commerce Commission ("ICC") has properly certified that it regulates pole attachments in the State. The FCC recognized the ICC's certification, by including Illinois on the list of the 20 states and the District of Columbia that have certified to the FCC that they regulate pole attachments. The FCC's certification list states: "Certification by a state preempts the Commission from accepting pole attachment complaints under Subpart J of Part 1 of the Rules."

Crown Castle 11: *Attached to this Complaint is a certificate of service certifying that ComEd and the Illinois Commerce Commission ("ICC") were served with copies of the Complaint.*

ComEd Answer: ComEd admits that such a document is attached to the Complaint. The certificate of service speaks for itself.

Crown Castle 12: *The FCC has jurisdiction over this action under the provisions of the Communications Act of 1934, as amended, including, but not limited to, Section 224 thereof, 47 U.S.C. § 224 (hereinafter "Section 224").*

ComEd Answer: ComEd filed a Motion to Dismiss in this proceeding that addresses these allegations⁶⁷ and ComEd incorporates its Motion to Dismiss by reference in this Answer. To the extent a response is otherwise required, the allegations of Paragraph 12 are denied. The FCC currently recognizes the State of Illinois as a state that has certified that it regulates pole attachments, and the rules provide that "[s]uch certificate shall be conclusive proof of lack of jurisdiction of this Commission" over a pole attachment complaint. 47 C.F.R. § 1.1405(a). All of the poles at issue in these proceedings are located in the State of Illinois, and the Illinois Commerce Commission ("ICC") has properly certified that it regulates pole attachments in the State. The FCC recognized the ICC's certification, by including Illinois on the list of the 20 states and the District of Columbia that have certified to the FCC that they regulate pole attachments. The FCC's certification list states: "Certification by a state preempts the Commission from accepting pole attachment complaints under Subpart J of Part 1 of the Rules."⁶⁸

⁶⁷ See Motion to Dismiss for Lack of Jurisdiction, *Crown Castle Fiber LLC v. Commonwealth Edison Company*, Proceeding Number 19-169, Bureau ID Number EB-19-MD-004 (filed Jun. 28, 2019); Motion to Dismiss for Lack of Jurisdiction, *Crown Castle Fiber LLC v. Commonwealth Edison Company*, Proceeding Number 19-170, Bureau ID Number EB-19-MD-005 (filed Jun. 28, 2019) (hereinafter "ComEd Motion to Dismiss")

⁶⁸ *States That Have Certified That They Regulate Pole Attachments*, Public Notice, DA No. 10-893, 25 FCC Rcd 5541 (2010).

Crown Castle 13: *The Commission has jurisdiction over rates, terms, and conditions of pole attachments except “where such matters are regulated by a State.*

ComEd Answer: ComEd filed a Motion to Dismiss in this proceeding that addresses these allegations⁶⁹ and ComEd incorporates its Motion to Dismiss by reference in this Answer. To the extent a response is otherwise required, the allegations of Paragraph 13 are denied. The FCC currently recognizes the State of Illinois as a state that has certified that it regulates pole attachments, and the rules provide that “[s]uch certificate shall be conclusive proof of lack of jurisdiction of this Commission” over a pole attachment complaint. 47 C.F.R. § 1.1405(a). All of the poles at issue in these proceedings are located in the State of Illinois, and the Illinois Commerce Commission (“ICC”) has properly certified that it regulates pole attachments in the State. The FCC recognized the ICC’s certification, by including Illinois on the list of the 20 states and the District of Columbia that have certified to the FCC that they regulate pole attachments. The FCC’s certification list states: “Certification by a state preempts the Commission from accepting pole attachment complaints under Subpart J of Part 1 of the Rules.”⁷⁰

Crown Castle 14: *The State of Illinois does not regulate telecommunication service providers’ pole attachments to poles owned by electric utilities, as required by Section 224(c) to preempt the Commission’s jurisdiction.*

ComEd Answer: ComEd filed a Motion to Dismiss in this proceeding that addresses these allegations⁷¹ and ComEd incorporates its Motion to Dismiss by reference in this Answer. To the extent a response is otherwise required, the allegations of Paragraph 14 are denied. The FCC currently recognizes the State of Illinois as a state that has certified that it regulates pole attachments, and the rules provide that “[s]uch certificate shall be conclusive proof of lack of jurisdiction of this Commission” over a pole attachment complaint. 47 C.F.R. § 1.1405(a). All of the poles at issue in these proceedings are located in the State of Illinois, and the Illinois Commerce Commission (“ICC”) has properly certified that it regulates pole attachments in the State. The FCC recognized the ICC’s certification, by including Illinois on the list of the 20 states and the District of Columbia that have certified to the FCC that they regulate pole attachments. The FCC’s certification list states: “Certification by a state preempts the Commission from accepting pole attachment complaints under Subpart J of Part 1 of the Rules.”⁷²

Crown Castle 15: *A State does not regulate pole attachment rates, terms, and conditions “unless the State has issued and made effective rules and regulations implementing the State’s regulatory authority over pole attachments.*

ComEd Answer: ComEd filed a Motion to Dismiss in this proceeding that addresses

⁶⁹ See ComEd Motion to Dismiss.

⁷⁰ *States That Have Certified That They Regulate Pole Attachments*, Public Notice, DA No. 10-893, 25 FCC Rcd 5541 (2010).

⁷¹ See ComEd Motion to Dismiss.

⁷² *States That Have Certified That They Regulate Pole Attachments*, Public Notice, DA No. 10-893, 25 FCC Rcd 5541 (2010).

these allegations⁷³ and ComEd incorporates its Motion to Dismiss by reference in this Answer. To the extent a response is otherwise required, the allegations of Paragraph 15 are denied. The FCC currently recognizes the State of Illinois as a state that has certified that it regulates pole attachments, and the rules provide that “[s]uch certificate shall be conclusive proof of lack of jurisdiction of this Commission” over a pole attachment complaint. 47 C.F.R. § 1.1405(a). All of the poles at issue in these proceedings are located in the State of Illinois, and the Illinois Commerce Commission (“ICC”) has properly certified that it regulates pole attachments in the State. The FCC recognized the ICC’s certification, by including Illinois on the list of the 20 states and the District of Columbia that have certified to the FCC that they regulate pole attachments. The FCC’s certification list states: “Certification by a state preempts the Commission from accepting pole attachment complaints under Subpart J of Part 1 of the Rules.”⁷⁴

Crown Castle 16: *While the ICC has certified to the FCC that it regulates pole attachments, the ICC’s pole attachment regulations, set forth in Title 83, Sections 315.10 through 315.70 of the Illinois Administrative Code, apply only to attachments by “cable television (“CATV”) companies.*

ComEd Answer: ComEd filed a Motion to Dismiss in this proceeding that addresses these allegations⁷⁵ and ComEd incorporates its Motion to Dismiss by reference in this Answer. To the extent a response is otherwise required, the allegations of Paragraph 16 are denied. The FCC currently recognizes the State of Illinois as a state that has certified that it regulates pole attachments, and the rules provide that “[s]uch certificate shall be conclusive proof of lack of jurisdiction of this Commission” over a pole attachment complaint. 47 C.F.R. § 1.1405(a). All of the poles at issue in these proceedings are located in the State of Illinois, and the Illinois Commerce Commission (“ICC”) has properly certified that it regulates pole attachments in the State. The FCC recognized the ICC’s certification, by including Illinois on the list of the 20 states and the District of Columbia that have certified to the FCC that they regulate pole attachments. The FCC’s certification list states: “Certification by a state preempts the Commission from accepting pole attachment complaints under Subpart J of Part 1 of the Rules.”⁷⁶ Additionally, 83 Ill. Admin. Code § 315.30 broadly covers all attachments.

Crown Castle 17: *The ICC’s pole attachment regulations do not apply to or make reference to attachments by telecommunications companies.*

ComEd Answer: ComEd filed a Motion to Dismiss in this proceeding that addresses these allegations⁷⁷ and ComEd incorporates its Motion to Dismiss by reference in this Answer. To the extent a response is otherwise required, the allegations of Paragraph 17 are denied. The FCC currently recognizes the State of Illinois as a state that has certified

⁷³ See ComEd Motion to Dismiss.

⁷⁴ *States That Have Certified That They Regulate Pole Attachments*, Public Notice, DA No. 10-893, 25 FCC Rcd 5541 (2010).

⁷⁵ See ComEd Motion to Dismiss.

⁷⁶ *States That Have Certified That They Regulate Pole Attachments*, Public Notice, DA No. 10-893, 25 FCC Rcd 5541 (2010).

⁷⁷ See ComEd Motion to Dismiss.

that it regulates pole attachments, and the rules provide that “[s]uch certificate shall be conclusive proof of lack of jurisdiction of this Commission” over a pole attachment complaint. 47 C.F.R. § 1.1405(a). All of the poles at issue in these proceedings are located in the State of Illinois, and the Illinois Commerce Commission (“ICC”) has properly certified that it regulates pole attachments in the State. The FCC recognized the ICC’s certification, by including Illinois on the list of the 20 states and the District of Columbia that have certified to the FCC that they regulate pole attachments. The FCC’s certification list states: “Certification by a state preempts the Commission from accepting pole attachment complaints under Subpart J of Part 1 of the Rules.”⁷⁸ Additionally, 83 Ill. Admin. Code § 315.30 broadly covers all attachments.

Crown Castle 18: *Because the ICC’s rules do not include attachments by telecommunications companies, the ICC does not have the authority to regulate attachments by telecommunications companies to electric utilities’ poles, and, therefore, jurisdiction over Crown Castle’s telecommunications attachments remains with the Commission.*

ComEd Answer: ComEd filed a Motion to Dismiss in this proceeding that addresses these allegations⁷⁹ and ComEd incorporates its Motion to Dismiss by reference in this Answer. To the extent a response is otherwise required, the allegations of Paragraph 18 are denied. The FCC currently recognizes the State of Illinois as a state that has certified that it regulates pole attachments, and the rules provide that “[s]uch certificate shall be conclusive proof of lack of jurisdiction of this Commission” over a pole attachment complaint. 47 C.F.R. § 1.1405(a). All of the poles at issue in these proceedings are located in the State of Illinois, and the Illinois Commerce Commission (“ICC”) has properly certified that it regulates pole attachments in the State. The FCC recognized the ICC’s certification, by including Illinois on the list of the 20 states and the District of Columbia that have certified to the FCC that they regulate pole attachments. The FCC’s certification list states: “Certification by a state preempts the Commission from accepting pole attachment complaints under Subpart J of Part 1 of the Rules.”⁸⁰ Additionally, 83 Ill. Admin. Code § 315.30 broadly covers all attachments. Finally, the text of the current regulations do not define the ICC’s “authority.” The Commission would, of course, always “have the authority to regulate.”

Crown Castle 19: *Appended hereto as Exhibit B is a letter from the Chairman of the ICC, confirming that the ICC does not claim jurisdiction over Crown Castle’s attachments to ComEd’s poles or this dispute. The ICC adopted the position set forth in the letter at its open meeting on October 25, 2018.*

ComEd Answer: ComEd filed a Motion to Dismiss in this proceeding that addresses these allegations⁸¹ and ComEd incorporates its Motion to Dismiss by reference in this Answer. To the extent a response is otherwise required, the allegations of Paragraph 19

⁷⁸ *States That Have Certified That They Regulate Pole Attachments*, Public Notice, DA No. 10-893, 25 FCC Rcd 5541 (2010).

⁷⁹ See ComEd Motion to Dismiss.

⁸⁰ *States That Have Certified That They Regulate Pole Attachments*, Public Notice, DA No. 10-893, 25 FCC Rcd 5541 (2010).

⁸¹ See ComEd Motion to Dismiss.

are denied. The FCC currently recognizes the State of Illinois as a state that has certified that it regulates pole attachments, and the rules provide that “[s]uch certificate shall be conclusive proof of lack of jurisdiction of this Commission” over a pole attachment complaint. 47 C.F.R. § 1.1405(a). All of the poles at issue in these proceedings are located in the State of Illinois, and the Illinois Commerce Commission (“ICC”) has properly certified that it regulates pole attachments in the State. The FCC recognized the ICC’s certification, by including Illinois on the list of the 20 states and the District of Columbia that have certified to the FCC that they regulate pole attachments. The FCC’s certification list states: “Certification by a state preempts the Commission from accepting pole attachment complaints under Subpart J of Part 1 of the Rules.”⁸² Notwithstanding the foregoing, ComEd states that the letter and ICC hearing transcript speak for themselves.

Crown Castle 20: *The Commission has held that jurisdiction for pole attachments reverts to the Commission if a State has not implemented pole attachment rules and regulations.*

ComEd Answer: ComEd filed a Motion to Dismiss in this proceeding that addresses these allegations⁸³ and ComEd incorporates its Motion to Dismiss by reference in this Answer. To the extent a response is otherwise required, the allegations of Paragraph 20 are denied. The FCC currently recognizes the State of Illinois as a state that has certified that it regulates pole attachments, and the rules provide that “[s]uch certificate shall be conclusive proof of lack of jurisdiction of this Commission” over a pole attachment complaint. 47 C.F.R. § 1.1405(a). All of the poles at issue in these proceedings are located in the State of Illinois, and the Illinois Commerce Commission (“ICC”) has properly certified that it regulates pole attachments in the State. The FCC recognized the ICC’s certification, by including Illinois on the list of the 20 states and the District of Columbia that have certified to the FCC that they regulate pole attachments. The FCC’s certification list states: “Certification by a state preempts the Commission from accepting pole attachment complaints under Subpart J of Part 1 of the Rules.”⁸⁴

Crown Castle 21: *Accordingly, the Commission has jurisdiction over Crown Castle’s telecommunications attachments to ComEd poles that are the subject of this Complaint.*

ComEd Answer: ComEd filed a Motion to Dismiss in this proceeding that addresses these allegations⁸⁵ and ComEd incorporates its Motion to Dismiss by reference in this Answer. To the extent a response is otherwise required, the allegations of Paragraph 21 are denied. The FCC currently recognizes the State of Illinois as a state that has certified that it regulates pole attachments, and the rules provide that “[s]uch certificate shall be conclusive proof of lack of jurisdiction of this Commission” over a pole attachment complaint. 47 C.F.R. § 1.1405(a). All of the poles at issue in these proceedings are located in the State of Illinois, and the Illinois Commerce Commission (“ICC”) has

⁸² *States That Have Certified That They Regulate Pole Attachments*, Public Notice, DA No. 10-893, 25 FCC Rcd 5541 (2010).

⁸³ See ComEd Motion to Dismiss.

⁸⁴ *States That Have Certified That They Regulate Pole Attachments*, Public Notice, DA No. 10-893, 25 FCC Rcd 5541 (2010).

⁸⁵ See ComEd Motion to Dismiss.

properly certified that it regulates pole attachments in the State. The FCC recognized the ICC's certification, by including Illinois on the list of the 20 states and the District of Columbia that have certified to the FCC that they regulate pole attachments. The FCC's certification list states: "Certification by a state preempts the Commission from accepting pole attachment complaints under Subpart J of Part 1 of the Rules."⁸⁶

D. BACKGROUND AND FACTS

As explained in ComEd's answers to Paragraphs 22-29 below, Crown Castle does not need ComEd's poles to deploy its services. And ComEd does not believe it has a written pole attachment agreement with Crown Castle because ComEd is unaware of any valid written notification of assignment of the pole attachment agreements with NextG, Sunesys, and Lightower to Crown Castle or to any of the named and unnamed intermediate entities who may or may not form the links between the entities entering into these agreements and Crown Castle.

Crown Castle 22: *Crown Castle requires access to utility-owned and controlled poles, conduits, and rights-of-way to build its telecommunications services networks and to provide competitive telecommunications services to its customers.*

ComEd Answer: ComEd denies the allegations in this paragraph. Crown Castle has other options to deploy its services, including installing its facilities underground and using the streetlights and other facilities owned by the City of Chicago and other municipalities located in ComEd's service territory.⁸⁷ For the reasons stated in its Affirmative Defenses, ComEd also denies that Crown Castle is providing any telecommunications services.

Crown Castle 23: *On December 22, 2004, Crown Castle (at the time operating under the name NextG Networks of Illinois, Inc.) and ComEd entered into a pole attachment agreement (the "Crown Castle Pole Attachment Agreement") that permits Crown Castle to attach fiber and wireless attachments to ComEd poles.*

ComEd Answer: As explained in the Affirmative Defenses in the Answer, ComEd does not believe it has a written pole attachment agreement with Crown Castle because ComEd is unaware of any valid written notification of assignment of the pole attachment agreements with NextG, Sunesys, and Lightower to Crown Castle or to any of the named and unnamed intermediate entities who may or may not form the links between the entities entering into these agreements and Crown Castle.⁸⁸

Crown Castle 24: *On May 5, 2005, Sunesys, Inc., which was later acquired by Crown Castle, and ComEd entered into a pole attachment agreement (the "Sunesys Pole Attachment*

⁸⁶ *States That Have Certified That They Regulate Pole Attachments*, Public Notice, DA No. 10-893, 25 FCC Rcd 5541 (2010).

⁸⁷ Declaration of Sarah S. Herrera at ¶8, attached hereto at Attachment I (hereinafter "Herrera Declaration").

⁸⁸ *Supra* at I.D. ¶¶28-33.

Agreement”) that permits Crown Castle to attach fiber optic and related attachments to ComEd poles.

ComEd Answer: ComEd Answer: As explained in the Affirmative Defenses in the Answer, ComEd does not believe it has a written pole attachment agreement with Crown Castle because ComEd is unaware of any valid written notification of assignment of the pole attachment agreements with NextG, Sunesys, and Lighttower to Crown Castle or to any of the named and unnamed intermediate entities who may or may not form the links between the entities entering into these agreements and Crown Castle.⁸⁹

Crown Castle 25: *On July 26, 2013, Sidera Networks d/b/a Lighttower Fiber Networks, which was later acquired by Crown Castle, and ComEd entered into a pole attachment agreement (the “Lighttower Pole Attachment Agreement”) that permits Crown Castle to attach fiber optic and related attachments to ComEd poles.*

ComEd Answer: ComEd Answer: As explained in the Affirmative Defenses in the Answer, ComEd does not believe it has a written pole attachment agreement with Crown Castle because ComEd is unaware of any valid written notification of assignment of the pole attachment agreements with NextG, Sunesys, and Lighttower to Crown Castle or to any of the named and unnamed intermediate entities who may or may not form the links between the entities entering into these agreements and Crown Castle.⁹⁰

Crown Castle 26: *On May 23, 2018, Lighttower Fiber Networks II, LLC notified the Illinois Commerce Commission that it changed its name to Crown Castle Fiber LLC. On December 31, 2018, Crown Castle NG and Sunesys, both of which were affiliates of Crown Castle Fiber LLC, consolidated into Crown Castle Fiber LLC, and consequently, cancelled their Certificates of Service Authority to provide telecommunications services in the State of Illinois.*

ComEd Answer: ComEd Answer: As explained in the Affirmative Defenses in the Answer, ComEd does not believe it has a written pole attachment agreement with Crown Castle because ComEd is unaware of any valid written notification of assignment of the pole attachment agreements with NextG, Sunesys, and Lighttower to Crown Castle or to any of the named and unnamed intermediate entities who may or may not form the links between the entities entering into these agreements and Crown Castle.⁹¹

Crown Castle 27: *Crown Castle has installed and continues to install fiber and small cell facilities on ComEd poles in the Chicago area pursuant to the three agreements described above.*

ComEd Answer: ComEd admits that Crown Cast has installed and continues to install fiber and small cell facilities on ComEd poles in the Chicago area. ComEd denies that Crown Castle made those installations and continues to make them pursuant to the three agreements described above because Crown Castle and its predecessors in interest have

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

not provided ComEd proper notice of any assignments of these agreements, as explained above.⁹²

Crown Castle 28: *Upon information and belief, ComEd jointly owns some poles with AT&T.*

ComEd Answer: ComEd admits the allegation in Paragraph 28 of the Complaint.

Crown Castle 29: *Crown Castle currently has multiple projects underway to deploy significant telecommunications infrastructure and services in the Chicago area. In connection with these projects, Crown Castle plans to deploy approximately [REDACTED] miles of fiber optic lines across multiple communities in the Chicago area that would be used to provide various telecommunications services, including to enterprise customers and wireless-carrier customers. In deploying these fiber optic lines for these projects, Crown Castle requires attachment to more than [REDACTED] ComEd poles. In addition, Crown Castle requires attachment to more than [REDACTED] ComEd poles for its deployment of wireless facility nodes for these projects.*

ComEd Answer: ComEd denies the allegations for lack of knowledge or information sufficient to form a belief as to their truth.

1. ComEd's Lawful Red Tag Practice

As explained in ComEd's answers to Paragraphs 30-61 below, ComEd performs regular pole inspections. Any pole which upon inspection is found to present a danger to life or property is promptly repaired, disconnected or isolated, in accordance with NESC Rule 214.A.5 in effect in Illinois. Any other pole which upon inspection is found to have deteriorated below original strength by more than 33% is "red tagged" and deemed a "reject pole," consistent with Table 261-1A of the 2002 NESC in effect in Illinois. Poles exhibiting this deterioration or any other defect in the course of inspection are recorded, and such records of defects are maintained until the defects are corrected, in accordance with NESC Rule 214.A.4 in effect in Illinois. To aid in the prioritization of corrective maintenance work, these red tagged rejected poles are further classified as either a "Priority Reject" pole or a "Non-Priority Reject" pole.

The Declaration of Nelson Bingel is based on his analysis of the wrong edition of the NESC, which contains different language than the one in effect in Illinois. Just as bad, he and Crown Castle both incorrectly assume that a red-tagged "Priority" pole as classified by ComEd is one that presents a danger to life or property and so must be fixed "promptly." As a result, the opinions expressed in his Declaration are misdirected and uninformed, as are the arguments of Crown Castle that rely upon them.

ComEd's practices and procedures ComEd follows with respect to its pole inspection program, including the identification and treatment of "red tagged" poles, complies with the NESC, which requires any condition that could endanger life or property to be promptly repaired, disconnected, or isolated, and which requires all other conditions to be recorded and to maintain such records until the defects are corrected.

⁹² *Id.*

Crown Castle is trying to use a nonexistent provision of the NESC in Illinois to convince the Commission that ComEd should perform a pole loading study that Crown Castle believes few in the industry perform in order to allow Crown Castle to attach its facilities to poles that have been red tagged.

The FCC should disregard Mr. Bingel's opinion: Mr. Bingel has never been responsible for running a major metropolitan utility. Questions of reasonableness or appropriateness are best left to those who are responsible not only for poles but for the remainder of the utility's urban infrastructure including cables, manholes, vaults, wires, and conduits, all of which demand resources to support an evolving grid of the future.

Importantly, the "red tagged" poles that Crown Castle references in this proceeding do not qualify as "red tagged" poles as defined by the Commission because they do not violate safety standards. As a result, the OTMR Order provisions applicable to "red tagged" poles do not apply.

Crown Castle's request for a ruling that ComEd's red tagged poles be replaced immediately by ComEd is a request for a rule that ComEd expand capacity, which the Commission and the courts have held is prohibited by the Pole Attachment Act.

Crown Castle 30: *In the regular course of business, as the result of regular pole inspections, ComEd identifies a certain number of its poles as being "red tagged." On information and belief, ComEd's designation of "red tagged" for a pole means that the pole has lost more than 33 percent of its original strength.*

ComEd Answer: ComEd admits that in the regular course of business, ComEd performs regular pole inspections. Any pole which upon inspection is found to present a danger to life or property is promptly repaired, disconnected or isolated, in accordance with NESC Rule 214.A.5 in effect in Illinois.⁹³ Any other pole which upon inspection is found to have deteriorated below original strength by more than 33% is "red tagged" and deemed a "reject pole," consistent with Table 261-1A of the 2002 NESC in effect in Illinois.⁹⁴ Poles exhibiting this deterioration or any other defect in the course of inspection are recorded, and such records of defects are maintained until the defects are corrected, in accordance with NESC Rule 214.A.4 in effect in Illinois.⁹⁵ To aid in the prioritization of corrective maintenance work, these red tagged rejected poles are further classified as either a "Priority Reject" pole or a "Non-Priority Reject" pole.⁹⁶

ComEd's designations for "Priority Reject" and "Non-Priority Reject" depend on the height of the pole. For a pole 60 feet or less in height above ground (i.e., 65-foot poles or shorter), a pole is red tagged and rejected if it has a remaining strength of 67% or less.

⁹³ Declaration of Patrick M. Arns at ¶4, attached hereto at Attachment F (hereinafter "Arns Declaration").

⁹⁴ 2002 NATIONAL ELECTRICAL SAFETY CODE, Table 261-1A (2001), attached hereto at Attachment O.

⁹⁵ Arns Declaration at ¶5.

⁹⁶ *Id.* at ¶6.

Poles of this height are deemed “Priority Reject” if they have 0% - 33% remaining strength. Poles of this height are deemed “Non-Priority Reject” if they have 34% - 67% remaining strength.⁹⁷

For a pole greater than 60 feet in height above ground (i.e., 70-foot poles or taller), a pole is red tagged and rejected if it has a remaining strength of 75% or less. Poles of this height are deemed “Priority Reject” if they have 0% - 33% remaining strength. Poles of this height are deemed “Non-Priority Reject” if they have 34% - 75% remaining strength.⁹⁸

Crown Castle 31: *As explained in the Declaration of NESC, pole, and safety expert, Nelson Bingel, under the NESC and standard industry practices, the application of a red tag to a pole means that the pole needs to be either replaced or in some cases, where possible, reinforced.*

ComEd Answer: ComEd admits that is what the Declaration of Nelson Bingel says. Mr. Bingel, however, relies for this statement and others in his Declaration on NESC Rule 214.A.5.a and 214.A.5.b.⁹⁹ In the 2017 edition of the NESC, NESC Rule 214.A.5. states:

214. Inspection and tests of lines and equipment

....

5. Corrections

- a. Lines and equipment with recorded conditions or defects that would reasonably be expected to endanger human life or property shall be promptly corrected, disconnected, or isolated.
- b. Other conditions or defects shall be designated for correction.¹⁰⁰

Contrary to Mr. Bingel’s assumption, the version of the NESC adopted in Illinois does not contain Rules 214.A.5.a and 214.A.5.b. The version of the NESC adopted in Illinois is the 2002 version of the Code.¹⁰¹ Instead, the relevant rule for this analysis are Rules 214.A.4 and .5, which in the 2002 NESC adopted by Illinois reads:

214. Inspection and Tests of Lines and Equipment

....

4. Record of Defects

⁹⁷ *Id.* at ¶7.

⁹⁸ *Id.* at ¶8.

⁹⁹ See Declaration of Nelson Bingel, attached to Crown Castle Pole Attachment Complaint at Attachment E, at ¶13 (CCF000325-CCF000326).

¹⁰⁰ 2017 NATIONAL ELECTRICAL SAFETY CODE, Rule 214.A.5.a-b. (Apr. 26, 2016), attached hereto at Attachment M.

¹⁰¹ ILL. ADMIN. CODE tit. 83, § 305.20 (2003).

Any defects affecting compliance with this code revealed by inspection or tests, if not promptly corrected, shall be recorded; such records shall be maintained until the defect is corrected.

5. Remedying Defects

Lines and equipment with recorded defects that could reasonably be expected to endanger life or property shall be promptly repaired, disconnected, or isolated.¹⁰²

Since Mr. Bingel's entire Declaration relies on the assumption that Rules 214.A.5.a and 214.A.5.b of the 2017 NESC has been adopted in Illinois, and since Mr. Bingel's Declaration makes no mention at all of the relevant Rules 214.A.4 and .5 in Illinois, much less provides any analysis of it, the opinions expressed in his Declaration are misdirected and uninformed.¹⁰³

Equally misdirected and uninformed are Crown Castle's and Mr. Bingel's assumptions that the poles ComEd designates as "Priority" poles are poles that endanger life or property. Such poles must "promptly" be "repaired, disconnected, or isolated," if one properly cites the 2002 NESC in effect in Illinois, or must "promptly" be "corrected, disconnected, or isolated" if one incorrectly cites the 2017 edition of the NESC, as does Mr. Bingel. Contrary to the incorrect assumption of Crown Castle and Mr. Bingel, however, ComEd's "Priority" red-tagged poles are not such poles that must "promptly" be "repaired, disconnected, or isolated."

Instead, in the regular course of business, ComEd performs regular pole inspections. Any pole which upon inspection is found to present a danger to life or property is promptly repaired, disconnected or isolated, in accordance with NESC Rule 214.A.5 in effect in Illinois. Any other pole which upon inspection is found to have deteriorated below original strength by more than 33% is "red tagged" and deemed a "reject pole," consistent with Table 261-1A of the 2002 NESC in effect in Illinois.¹⁰⁴ Poles exhibiting this deterioration or any other defect in the course of inspection are recorded, and such records of defects are maintained until the defects are corrected, in accordance with NESC Rule 214.A.4 in effect in Illinois.¹⁰⁵

Crown Castle 32: *According to a document provided to Crown Castle by ComEd, ComEd designates red tagged poles as either "Priority" or "Non-priority," and further differentiates poles that are Restorable or Non-Restorable. Thus, ComEd has four categories: (i) Priority Non-Restorable (Replacement) Reject poles, (ii) Non-priority Non-Restorable (Replacement) Reject poles, (iii) Priority Restorable Reject poles, and (iv) Non-priority Restorable Reject poles.*

¹⁰² 2002 NATIONAL ELECTRICAL SAFETY CODE, Rule 214.A.4-.5 (2001), attached hereto at Attachment N; Declaration of David N. D'Hooze, P.E. at ¶4, attached hereto at Attachment G (hereinafter "D'Hooze Declaration")

¹⁰³ D'Hooze Declaration at ¶5.

¹⁰⁴ 2002 NATIONAL ELECTRICAL SAFETY CODE, Table 261-1A (2001).

¹⁰⁵ Arns Declaration at ¶5.

ComEd Answer: ComEd admits the allegations in Paragraph 32 of the Complaint.

Crown Castle 33: *ComEd has not provided Crown Castle with information identifying the standards used for designating poles as priority/non-priority or restorable/replacement.*

ComEd Answer: ComEd cannot recall whether Crown Castle has requested such information or whether ComEd has orally provided at least a general description of the criteria used for designating poles as priority/non-priority or restorable/replacement. A detailed, accurate description of ComEd's program can be quite complicated including a large number of variants and different inspection methods, and ComEd's program depends on information such as wood species, original treatment type, setting medium, accessibility, presence of other underground facilities, pole height, electric capacity, effective circumference, pole defects (e.g., splits, woodpecker holes, cracks), service attachments, the impact on electric distribution customers, and other factors. It should also be noted that ComEd's pole inspections are currently outsourced to Osmose Utility Services, Inc., using Osmose load calculation software and using Osmose pole treatment services. This is the company with which Crown Castle's expert Mr. Bingel was employed for 30 years.

ComEd's specification for pole maintenance services is shared with its pole co-owners, sister companies, and its service provider. Beyond that, these are treated as internal proprietary documents.¹⁰⁶

Crown Castle 34: *NESC Rule 214.A.5(a) states, "Lines and equipment with recorded conditions or defects that would reasonably be expected to endanger human life or property shall be promptly corrected, disconnected or isolated." Rule 214.A.5(b) states "Other conditions or defects shall be designated for correction.*

ComEd Answer: ComEd admits that is what NESC Rules 214.A.5.a and 214.A.5.b in the 2017 edition of the NESC states. However, this Rule has not been adopted in Illinois and is not effective in Illinois. Instead, the 2002 edition of the NESC has been adopted in Illinois.¹⁰⁷ The relevant rule for this analysis is Rules 214.A.4 and .5, which in the NESC adopted by Illinois reads:

214. Inspection and Tests of Lines and Equipment

. . . .

4. Record of Defects

Any defects affecting compliance with this code revealed by inspection or tests, if not promptly corrected, shall be recorded; such records shall be maintained until the defect is corrected.

¹⁰⁶ D'Hooge Declaration at ¶7.

¹⁰⁷ ILL. ADMIN. CODE tit. 83, § 305.20 (2003).

5. Remedying Defects

Lines and equipment with recorded defects that could reasonably be expected to endanger life or property shall be promptly repaired, disconnected, or isolated.¹⁰⁸

At ComEd, any poles or other structures which are found to pose an immediate safety hazard are mitigated with immediate resource commitment toward isolation, repair or replacement to remove the hazard. Conditions related to wider infrastructure operation and maintenance are responsibly prioritized, managed and executed.¹⁰⁹

Crown Castle 35: *Consistent with the NESC's requirements, standard industry practice is to replace "priority" red tagged poles within approximately 90 days after inspection (depending on the severity of the loss of strength), and to replace or restore non-priority red tagged poles within approximately one year.*

ComEd Answer: ComEd denies the allegations in this paragraph as unsupported. Crown Castle supports this statement with the Bingel Declaration at paragraph 13, which itself supports these statements by citing NESC Rule 214.A.5.a and 214.A.5.b in the 2017 edition of the NESC. However, this Rule has not been adopted in Illinois and is not effective in Illinois. Instead, the 2002 edition of the NESC has been adopted in Illinois.¹¹⁰

The relevant rule for this analysis are Rules 214.A.4 and .5, which in the 2002 NESC adopted by Illinois read:

214. Inspection and Tests of Lines and Equipment

....

4. Record of Defects

Any defects affecting compliance with this code revealed by inspection or tests, if not promptly corrected, shall be recorded; such records shall be maintained until the defect is corrected.

5. Remedying Defects

Lines and equipment with recorded defects that could reasonably be expected to endanger life or property shall be promptly repaired, disconnected, or isolated.¹¹¹

¹⁰⁸ 2002 NATIONAL ELECTRICAL SAFETY CODE, Rule 214.A.4-.5 (2001).

¹⁰⁹ D'Hooge Declaration at ¶6.

¹¹⁰ ILL. ADMIN. CODE tit. 83, § 305.20 (2003).

¹¹¹ 2002 NATIONAL ELECTRICAL SAFETY CODE, Rule 214.A.4-.5 (2001).

Since Mr. Bingel's entire Declaration relies on the assumption that Rule 214.A.5 of the 2017 NESC has been adopted in Illinois, and since Mr. Bingel's Declaration makes no mention at all of the relevant Rules 214.A.4 and .5 in Illinois, much less provides any analysis of it, the opinions expressed in his Declaration are misdirected and uninformed.¹¹²

Crown Castle and Mr. Bingel have also incorrectly assumed that the poles ComEd designates as "Priority" poles are poles that endanger life or property. Such poles must "promptly" be "repaired, disconnected, or isolated," if one properly cites the 2002 NESC in effect in Illinois, or must "promptly" be "corrected, disconnected, or isolated" if one incorrectly cites the 2017 edition of the NESC, as does Mr. Bingel. Contrary to the incorrect assumption of Crown Castle and Mr. Bingel, however, ComEd's "Priority" red-tagged poles are not such poles that must "promptly" be "repaired, disconnected, or isolated."

In the regular course of business, ComEd performs regular pole inspections. Any pole which upon inspection is found to present a danger to life or property is promptly repaired, disconnected or isolated, in accordance with NESC Rule 214.A.5 in effect in Illinois. Any other pole which upon inspection is found to have deteriorated below original strength by more than 33% is "red tagged" and deemed a "reject pole," consistent with Table 261-1A of the 2002 NESC in effect in Illinois.¹¹³ Poles exhibiting this deterioration or any other defect in the course of inspection are recorded, and such records of defects are maintained until the defects are corrected, in accordance with NESC Rule 214.A.4 in effect in Illinois.¹¹⁴

Moreover, Crown Castle has also misquoted Mr. Bingel. Mr. Bingel's Declaration does not state that "standard industry practice is to replace 'priority' red tagged poles within approximately 90 days after inspection." Instead, Mr. Bingel states: "Standard industry practice is to restore or replace 'priority' poles within time frames such as 30, 90 or 180 days." The varying length of time reflects the fact that utilities may have varying standards for when a red tagged pole becomes 'priority.'" This statement indicates that there is no industry-wide standard at all, even under inapplicable NESC Rule 214.A.5, and that instead each utility may adopt their own standard.¹¹⁵

For both "priority" and "non-priority" poles, there is no "industry standard" that details a timeframe for the replacement of reject structures beyond the "promptly" called for in Rule 214.A.5 for those defects "expected to endanger life or property."¹¹⁶ At ComEd any poles or other structures which are found to pose an immediate safety hazard are mitigated with immediate resource commitment toward isolation, repair or replacement to remove the hazard. Conditions related to wider infrastructure operation and maintenance are responsibly prioritized, managed and executed.¹¹⁷

¹¹² D'Hooe Declaration at ¶5.

¹¹³ 2002 NATIONAL ELECTRICAL SAFETY CODE, Table 261-1A (2001).

¹¹⁴ Arns Declaration at ¶5.

¹¹⁵ D'Hooe Declaration at ¶8.

¹¹⁶ *Id.* at ¶9.

¹¹⁷ *Id.* at ¶6.

As a person with extensive experience in the Standards community, Mr. Bingel should be well aware of the thresholds necessary to create an industry standard as opposed to a “typical” or a “common” practice. Unlike industry standards, what might be considered to be “typical” or “common” practices can be influenced by perception. Mr. Bingel’s perception is likely influenced by working primarily with companies who have hired his former company Osmose for an inspection service. Those companies may offer an incomplete picture of the industry as a whole.¹¹⁸

And finally, for “non-priority” poles, ComEd does in fact treat them immediately upon inspection with a pole treatment product from Osmose in order to control the decay, maintain the asset, and “extend the useful life” of the pole.¹¹⁹ As explained on the Osmose website: “Applying effective remedial treatments to extend the safe, reliable service-life of the pole. Remedial treatment is the key to getting the most out of your investment. The use of remedial treatments will earn dividends via extended pole life and improved plant resiliency.”¹²⁰

Once “non-priority” poles are discovered and immediately treated,¹²¹ ComEd does not allow anyone (including ComEd itself) to install additional facilities to that pole without first replacing it or reinforcing it.¹²²

Crown Castle 36: *In addition, under standard industry practice, poles are originally red tagged during inspection when the remaining strength of the pole is compared to the original strength of the pole. However, the exact requirement of the NESC, as stated in Footnote 2 of Table 261-1, is that a pole becomes a “reject” (i.e. red tagged) when the strength is reduced to two-thirds of what is required for the actual loading. Because the inspection process typically does not include an analysis of the actual loading, the inspection process assumes that the pole is fully loaded. Therefore, as a practical matter, a pole becomes a red tagged pole when the remaining strength is two-thirds or less of the original pole strength, regardless of actual loading. However, when the actual loading for a pole is determined, the pole may actually be available for attachment because under the NESC the remaining strength must exceed two-thirds of the strength required to support the loading actually on the pole. Most wood utility poles are not fully loaded. As a result, many poles that may appear to be below the 67% strength threshold based only on the original strength of the pole may not rise above the threshold for red tagging when the actual loading were taken into account. As an example, if a pole is only loaded to 75% of its capacity, then the NESC only requires the pole to have 50% of its original strength before it should be red tagged. Despite the fact that to determine whether a pole should be red tagged based on the actual load would require a loading analysis, the practice of analyzing the actual load on a red tag pole to see if it still meets code requirements is not widely applied in the industry today.*

¹¹⁸ *Id.* at ¶10.

¹¹⁹ There is an exception for treatment in that poles located on school properties, parks, playgrounds, and in wetlands do NOT receive a groundline treatment.

¹²⁰ Osmose Utilities Services, Inc., Wood Pole Services, *Wood Pole Inspection & Life Extension* (Jul. 20, 2019), <https://www.osmose.com/pole-inspection-treatment-maintenance>; D’Hooge Declaration at ¶11.

¹²¹ There is an exception for treatment in that poles located on school properties, parks, playgrounds, and in wetlands do NOT receive a groundline treatment.

¹²² D’Hooge Declaration at ¶12.

What this means is that there may be some number of poles that may have been assigned a red tag status, but under the NESC those poles should not be red tagged because if a loading analysis were performed, the pole would not reach the threshold for reject status.

ComEd Answer: ComEd denies the allegations in this paragraph as unsupported. This paragraph is supported by the Bingel Declaration at paragraph 12 and repeated there verbatim, except for the introductory language, “In addition, under standard industry practice...” Mr. Bingel’s Declaration does not state that any of the practices explained in this paragraph are “standard industry practices,” and so the suggestion that they are somehow standards is unsupported.¹²³

The second sentence does not state the “exact requirement” of the NESC, as adopted in Illinois. Footnote 2 of Table 261-1A of the 2002 NESC that has been adopted in Illinois does not include the term “actual loading” or anything like it. What the referenced footnote from the applicable (2002) NESC does is call for repair or replacement when the strength is reduced to “2/3 of that required when installed.”¹²⁴ The term “that required” could be interpreted to suggest actual loading, however actual loading would also involve accounting for any facilities that may have been added or removed in the intervening years. But, “when installed” precludes accounting for these changes. At a minimum, the term “actual loading” would be too broad an interpretation.¹²⁵

Perhaps Mr. Bingel is instead again mistakenly referencing the 2017 NESC which has not been adopted in Illinois and which includes a different footnote to allow the incorporation of modified loads. Whatever the case, and whether or not Mr. Bingel’s interpretation of the 2017 NESC is correct, the term “actual loading” is not an appropriate term to refer to the 2002 NESC in effect in Illinois. As such, Mr. Bingel’s argument that relies a half dozen times on the phrase “actual loading” is misdirected and misinformed with respect to the NESC in Illinois.¹²⁶

Not only is this reliance on “actual loading” inappropriate in the state of Illinois, it forms the basis of a self-serving and contradictory suggestion by Crown Castle. Using Mr. Bingel’s mistaken Declaration for support, Crown and Mr. Bingel suggest that loading studies can and do confirm a “red tag” pole is available for new attachments: “when the actual loading for a pole is determined, the pole may actually be available for attachment because under the NESC the remaining strength must exceed two-thirds of the strength required to support the loading actually on the pole.”¹²⁷ Later in the paragraph, however, they both state that it is not a common industry practice for this kind of analysis to be performed: “the practice of analyzing the actual load on a red tag pole to see if it still meets code requirements is not widely applied in the industry today.”¹²⁸

Crown Castle is therefore trying to use a nonexistent provision of the NESC in Illinois to

¹²³ *Id.* at ¶13.

¹²⁴ 2002 NATIONAL ELECTRICAL SAFETY CODE, Table 261-1A, n.2 (2001).

¹²⁵ *Id.* at ¶14.

¹²⁶ *Id.* at ¶15.

¹²⁷ *Id.* at ¶16.

¹²⁸ *Id.* at ¶16.

convince the Commission that ComEd should perform a pole loading study that Crown Castle believes few in the industry perform in order to allow Crown Castle to attach its facilities to poles that have been red tagged.¹²⁹

Crown Castle also assumes a level of precision surrounding the inspection company's strength estimation and their load calculation that is not warranted. Each of these assessments is no more than an imprecise determination, the manipulation of which results in an even less precise determination. It is therefore appropriate for ComEd to determine that a pole which has failed inspection because it was shown to be deteriorated should not support additional facilities, even if an imprecise loading study later suggests it might possibly withstand additional load.¹³⁰

Moreover, even if the NESC in effect in Illinois would make the sections covering 214.A.5.a and 214.A.5.b of the NESC Handbook applicable, and even if the unusual loading studies Crown proposes were more precise, it would be inappropriate to require utilities to design and operate their systems in accordance with the minimum standards of the NESC. As explained in the first section of the NESC, the NESC contains "basic provisions" necessary for safety, and "is not intended as a design specification or as an instruction manual."¹³¹

To establish its engineering and design practices, many of which exceed NESC minimum code compliances, ComEd must factor in considerations related to reliability, resiliency, and planning, the safety of all those working on its poles, and the safe and efficient operation of its pole plant as a whole. It is unworkable and unsafe as a practical matter, and thus a very poor engineering and design practice, to design down to minimum code compliance without assessing these numerous other factors that affect the safety, efficiency and reliability of the system.¹³²

The Commission should disregard Mr. Bingel's opinion: Mr. Bingel has never been responsible for running a major metropolitan utility. Questions of reasonableness or appropriateness are best left to those who are responsible not only for poles but for the remainder of the utility's urban infrastructure including cables, manholes, vaults, wires, and conduits, all of which demand resources to support an evolving grid of the future.¹³³

Crown Castle 37: *According to the document provided by ComEd, Priority Restorable poles are restored in the current inspection year and Priority Non-Restorable (Replacement) poles are scheduled for replacement the "next calendar year after inspection."*

ComEd Answer: With limited exceptions, Priority Restorable poles are restored in the current inspection year and Priority Non-Restorable (Replacement) poles are scheduled

¹²⁹ *Id.* at ¶17.

¹³⁰ *Id.* at ¶18.

¹³¹ 2017 NATIONAL ELECTRICAL SAFETY CODE, Rule 010.B. and 010.C. (Apr. 26, 2016); D'Hooge Declaration at ¶27.

¹³² D'Hooge Declaration at ¶19.

¹³³ *Id.* at ¶20.

for replacement the “next calendar year after inspection.”¹³⁴

Crown Castle 38: *Crown Castle is not aware of whether this policy of ComEd has been practiced.*

ComEd Answer: ComEd cannot say what Crown Castle is not aware of, but states that ComEd follows this process with limited exceptions.¹³⁵

Crown Castle 39: *Moreover, the ComEd Summary document asserts that Non-Priority Restorable poles “will be Restored/Reinforce/C-Truss after Load Calculation classification within a set timeframe,” and likewise, Priority Non-Restorable (Replacement) poles will be replaced “after Load Calculation classification within a set timeframe.”*

ComEd Answer: ComEd admits the allegation in Paragraph 39 of the Complaint that the Technical Bulletin asserts that Non-Priority Restorable poles “will be Restored/Reinforce/C-Truss after Load Calculation classification within a set timeframe.” What that means is that if the load calculation determines that the pole is worse than ComEd initially determined, it will be treated as a priority pole and be Restored/Reinforced/C-Trussed within a set time frame. ComEd denies the allegation that the Technical Bulletin asserts that Priority Non-Restorable (Replacement) poles will be replaced “after Load Calculation classification within a set timeframe.” ComEd does not perform a load calculation on priority poles, and the Technical Bulletin does not state that ComEd does. The Technical Bulletin does state, however, that Non-Priority Non-Restorable (Replacement) poles will be replaced “after Load Calculation classification within a set timeframe.” As above, what that means is that if the load calculation determines that the pole is worse than ComEd initially determined, it will be treated as a priority pole and be Restored/Reinforced/C-Trussed within a set time frame.

ComEd further denies the suggestion that its “Technical Bulletin” should be referred to as a “Summary document.” This document is not intended as a summary of the program, which would be more extensive. This is merely a field document for quick reference. Tech Bulletins are not intended to be “high level summaries.” They are a quick communication used to announce technical changes related to ComEd’s engineering, operation, or construction of its Distribution system. They are also used, as in this case, to reinforce existing policies when needed. The specified target audience for this communication was ComEd’s Engineering, Operations, Construction, and Maintenance personnel. This internal document was shared with Crown Castle because it was seen as a useful, handy reference.

Crown Castle 40: *However, Crown Castle understands that ComEd is not performing Load Calculations on any Non-Priority red tagged poles.*

ComEd Answer: ComEd cannot say what Crown Castle understands or does not understand, but ComEd does perform load calculations on Non-Priority red tagged poles

¹³⁴ Declaration of Peter Tyschenko at ¶4, attached hereto at Attachment H (hereinafter “Tyschenko Declaration”).

¹³⁵ Tyschenko Declaration at ¶4.

as a prioritization mechanism. ComEd's contractor Osmose performs the load calculation using Osmose's "LoadCalc" software, and performs the calculation on all non-priority poles the week following inspection when the pole is being inspected on the ten-year cycle. The load calculation performed by Osmose is just an estimate which cannot determine what the exact load is but can provide enough of a determination to further classify the poles. Once the load calculation is done, ComEd further categorizes the poles for prioritization.¹³⁶

Immediately upon inspection, ComEd treats "non-priority" poles with a pole treatment product from Osmose in order to control the decay, maintain the asset, and "extend the useful life" of the pole.¹³⁷ As explained on the Osmose website: "Applying effective remedial treatments to extend the safe, reliable service-life of the pole. Remedial treatment is the key to getting the most out of your investment. The use of remedial treatments will earn dividends via extended pole life and improved plant resiliency."¹³⁸

Once "non-priority" poles are discovered and immediately treated,¹³⁹ ComEd does not allow anyone (including ComEd itself) to install additional facilities to that pole without first replacing it or reinforcing it.¹⁴⁰

Crown Castle 41: *On information and belief, ComEd uses a 10-year year cycle for inspecting its poles, which means that ComEd inspects each of its poles once every ten years. Thus, poles that are designated as non-priority red tags will go at least 10 years without being corrected, and will be re-evaluated at the next inspection, 10 years later, unless an attaching party seeks to do work or attach to the pole during that time. Such Non-priority red tag poles will only be corrected if some attaching party seeks to do work on the pole, at which point, as discussed below, ComEd requires the pole to be replaced at the expense of the attaching party.*

ComEd Answer: ComEd admits the allegation that ComEd uses a 10-year cycle for inspecting its poles, which means that ComEd inspects each of its poles once every ten years.¹⁴¹

ComEd denies that poles that are designated as non-priority red tags will go at least 10 years without action. Instead, immediately upon inspection, ComEd treats "non-priority" poles with a pole treatment product from Osmose in order to control the decay, maintain the asset, and "extend the useful life" of the pole.¹⁴² As explained on the Osmose website: "Applying effective remedial treatments to extend the safe, reliable service-life

¹³⁶ *Id.* at ¶5.

¹³⁷ There is an exception for treatment in that poles located on school properties, parks, playgrounds, and in wetlands do NOT receive a groundline treatment.

¹³⁸ Osmose Utilities Services, Inc., *Wood Pole Inspection & Life Extension* (Jul. 20, 2019), <https://www.osmose.com/pole-inspection-treatment-maintenance>; Tyschenko Declaration at ¶6.

¹³⁹ There is an exception for treatment in that poles located on school properties, parks, playgrounds, and in wetlands do NOT receive a groundline treatment.

¹⁴⁰ Tyschenko Declaration at ¶7.

¹⁴¹ Arns Declaration at ¶9.

¹⁴² There is an exception for treatment in that poles located on school properties, parks, playgrounds, and in wetlands do NOT receive a groundline treatment; Arns Declaration at ¶10.

of the pole. Remedial treatment is the key to getting the most out of your investment. The use of remedial treatments will earn dividends via extended pole life and improved plant resiliency.”¹⁴³ Following this treatment, “non-priority” poles are scheduled for remediation whenever any entity (including ComEd) wants to upgrade facilities, add additional facilities to the pole, or subsequent inspection adjusts priority. This process makes sense because if the structure is currently in serviceable condition, then treating it with a product will control further decay and maximize its useful life without adding further stress. The strength calculation performed by Osmose is only an estimate which cannot determine what the exact load is but can provide reliable indication of its ability to handle the existing stress. Adding new facilities to a pole in this condition is not a reliability and resiliency risk that ComEd can allow for its customers, regardless of whether ComEd or some other entity wants to add facilities.¹⁴⁴

Following treatment, should any entity (including ComEd) wish to add facilities to the pole, then that entity (including ComEd) must pay either to replace the pole or to restore the pole. This makes sense because it is the cost causer who pays to accommodate its attachments on a pole that cannot otherwise accommodate them.¹⁴⁵

These practices and procedures ComEd follows with respect to its pole inspection program, including the identification and treatment of “red tagged” poles, complies with the NESC, which requires any condition that could endanger life or property to be promptly repaired, disconnected, or isolated, and which requires all other conditions to be recorded and to maintain such records until the defects are corrected.¹⁴⁶

Crown Castle 42: *It is not a reasonable industry practice nor is it reasonable or appropriate engineering practice to wait more than 1 year and up to as much as 10 years before correcting a pole after it is labeled with a red tag.*

ComEd Answer: ComEd denies the allegations in Paragraph 42 of the Complaint. This statement is based on the following several opinions expressed in the Bingel Declaration:

At paragraph 13 of his Declaration, cited by Crown Castle, Mr. Bingel states: “Standard industry practice is to restore or replace ‘priority’ poles within time frames such as 30, 90 or 180 days. The varying length of time reflects the fact that utilities may have varying standards for when a red tagged pole becomes ‘priority.’” This statement indicates that there is no industry-wide standard at all, even under inapplicable NESC Rule 214.A.5, and that instead each utility may adopt their own standard.¹⁴⁷

Second, Mr. Bingel claims that “Standard industry practice is to restore or replace Non-Priority poles during the next year’s inspection program, although it is not unusual for utility companies to restore Non- Priority poles during the same year as the

¹⁴³ Osmose Utilities Services, Inc., Wood Pole Services, *Wood Pole Inspection & Life Extension* (Jul. 20, 2019), <https://www.osmose.com/pole-inspection-treatment-maintenance>.

¹⁴⁴ Arns Declaration at ¶11.

¹⁴⁵ *Id.* at ¶12.

¹⁴⁶ Arns Declaration at ¶13.

¹⁴⁷ D’Hooge Declaration at ¶8.

inspection.”¹⁴⁸ But there is no standard industry practice that Mr. Bingel cites to. If there is such an “Industry Standard” then Crown Castle should produce any such published standard, which presumably would be an ANSI-accredited, consensus-based document. Lacking one, what the industry has instead are a variety of Company standards, which will vary according to the particular companies’ particular conditions.¹⁴⁹ As a person with extensive experience in the Standards community, Mr. Bingel should be well aware of the thresholds necessary to create an industry standard as opposed to a “typical” or a “common” practice. Both of these can be influenced by perception.¹⁵⁰

For both “priority” and “non-priority” poles, there is no “industry standard” that details a timeframe for the replacement of reject structures beyond the “promptly” called for in Rule 214.A.5 for those defects “expected to endanger life or property.”¹⁵¹

Mr. Bingel’s perception is likely influenced by working primarily with companies who have hired his former company Osmose for an inspection service. Those companies may offer an incomplete picture of the industry as a whole.

Third, Mr. Bingel claims that: “It is not a reasonable industry practice nor is it reasonable or appropriate engineering practice to wait more than 1 year and up to as much as 10 years before re-inspecting and/or correcting a pole after it is labeled with a red tag.”¹⁵²

For “non-priority” poles, ComEd does in fact treat them immediately upon inspection with a pole treatment product from Osmose in order to control the decay, maintain the asset, and “extend the useful life” of the pole.¹⁵³ As explained on the Osmose website: “Applying effective remedial treatments to extend the safe, reliable service-life of the pole. Remedial treatment is the key to getting the most out of your investment. The use of remedial treatments will earn dividends via extended pole life and improved plant resiliency.”¹⁵⁴

Once “non-priority” poles are discovered and immediately treated,¹⁵⁵ ComEd does not allow anyone (including ComEd itself) to install additional facilities to that pole without first replacing it or reinforcing it.¹⁵⁶

The FCC should disregard Mr. Bingel’s opinion: Mr. Bingel has never been responsible

¹⁴⁸ See Declaration of Nelson Bingel, attached to Crown Castle Pole Attachment Complaint at Attachment E, at ¶25 (CCF000327).

¹⁴⁹ D’Hooge Declaration at ¶21.

¹⁵⁰ *Id.* at ¶10.

¹⁵¹ *Id.* at ¶9.

¹⁵² See Declaration of Nelson Bingel, attached to Crown Castle Pole Attachment Complaint at Attachment E, at ¶26 (CCF000327).

¹⁵³ There is an exception for treatment in that poles located on school properties, parks, playgrounds, and in wetlands do NOT receive a groundline treatment.

¹⁵⁴ Osmose Utilities Services, Inc., Wood Pole Services, *Wood Pole Inspection & Life Extension* (Jul. 20, 2019), <https://www.osmose.com/pole-inspection-treatment-maintenance>; D’Hooge Declaration at ¶11.

¹⁵⁵ There is an exception for treatment in that poles located on school properties, parks, playgrounds, and in wetlands do NOT receive a groundline treatment.

¹⁵⁶ D’Hooge Declaration at ¶12.

for running a major metropolitan utility. Questions of reasonableness or appropriateness are best left to those who are responsible not only for poles but for the remainder of the utility's urban infrastructure including cables, manholes, vaults, wires, and conduits, all of which demand resources to support an evolving grid of the future.¹⁵⁷

Finally, Mr. Bingel claims: "Indeed, ComEd's practices suggest that some significant number of its Non-Priority Poles may be able to accommodate attachment by Crown Castle if a loading analysis were performed. At a minimum, it is not reasonable for ComEd to apply red tag status to a significant number of poles and have those poles remain in that status for potentially many years, unavailable for additional third-party attachment or even any work by existing attaching companies."¹⁵⁸

This conclusion is based on Mr. Bingel's earlier analysis at paragraph 12 of his Declaration. Contrary to his assertions in that paragraph, he has failed to state the "actual requirement" of the NESC, as adopted in Illinois. Footnote 2 of Table 261-1A of the 2002 NESC that has been adopted in Illinois does not include the term "actual loading" or anything like it. What the referenced footnote from the applicable (2002) NESC does is call for repair or replacement when the strength is reduced to "2/3 of that required when installed."¹⁵⁹ The term "that required" could be interpreted to suggest actual loading, however actual loading would also involve accounting for any facilities that may have been added or removed in the intervening years. But, "when installed" precludes accounting for these changes. At a minimum, the term "actual loading" would be too broad an interpretation.¹⁶⁰

Perhaps Mr. Bingel is instead again mistakenly referencing the 2017 NESC which has not been adopted in Illinois and which revised this footnote to allow the incorporation of modified loads. Whatever the case, and whether or not Mr. Bingel's interpretation of the 2017 NESC is correct, the term "actual loading" is not an appropriate term to refer to the 2002 NESC in effect in Illinois. As such, Mr. Bingel's argument that relies a half dozen times on the phrase "actual loading" is misdirected and misinformed with respect to the NESC in Illinois.¹⁶¹

Not only is this reliance on "actual loading" inappropriate in the state of Illinois, it forms the basis of a self-serving and contradictory suggestion by Crown Castle. Using Mr. Bingel's mistaken Declaration for support, Crown and Mr. Bingel suggest that loading studies can and do confirm a "red tag" pole is available for new attachments: "when the actual loading for a pole is determined, the pole may actually be available for attachment because under the NESC the remaining strength must exceed two-thirds of the strength required to support the loading actually on the pole." Later in the paragraph, however, they both state that it is not a common industry practice for this kind of analysis to be performed: "the practice of analyzing the actual load on a red tag pole to see if it still

¹⁵⁷ *Id.* at ¶20.

¹⁵⁸ *See* Declaration of Nelson Bingel, attached to Crown Castle Pole Attachment Complaint at Attachment E, at ¶27 (CCF000327-CCF000328).

¹⁵⁹ 2002 NATIONAL ELECTRICAL SAFETY CODE, Table 261-1A, n.2 (2001)

¹⁶⁰ D'Hooe Declaration at ¶14.

¹⁶¹ *Id.* at ¶15.

meets code requirements is not widely applied in the industry today.”¹⁶²

Crown Castle is therefore trying to use a nonexistent provision of the NESC in Illinois to convince the Commission that ComEd should perform a pole loading study that Crown Castle believes few in the industry perform in order to allow Crown Castle to attach its facilities to poles that have been red tagged.¹⁶³

Crown Castle also assumes a level of precision surrounding the inspection company’s strength estimation and their load calculation that is not warranted. Each of these assessments is no more than an imprecise determination, the manipulation of which results in an even less precise determination. It is therefore appropriate for ComEd to determine that a pole which has failed inspection because it was shown to be deteriorated should not support additional facilities, even if an imprecise loading study later suggests it might possibly withstand additional load.¹⁶⁴

Moreover, even if the NESC in effect in Illinois would make the sections covering 214.A.5.a and 214.A.5.b of the NESC Handbook applicable, and even if the unusual loading studies Crown proposes were more precise, it would be inappropriate to require utilities to design and operate their systems in accordance with the minimum standards of the NESC. As explained in the first section of the NESC, the NESC contains “basic provisions” necessary for safety, and “is not intended as a design specification or as an instruction manual.”¹⁶⁵

To establish its engineering and design practices, many of which exceed NESC minimum code compliances, ComEd must factor in considerations related to reliability, resiliency, and planning, the safety of all those working on its poles, and the safe and efficient operation of its pole plant as a whole. It is unworkable and unsafe as a practical matter, and thus a very poor engineering and design practice, to design down to minimum code compliance without assessing these numerous other factors that affect the safety, efficiency and reliability of the system.¹⁶⁶

Finally, as mentioned above, Mr. Bingel relies on the 2017 version of NESC Sections 214.A.5.a and 214.A.5.b for his conclusions about when priority poles should be fixed.¹⁶⁷ Even if the 2017 NESC applied to Illinois, it agrees with the 2002 version in that neither specifies any timeline beyond “promptly” for those structures expected to endanger life or property.¹⁶⁸

Crown Castle and Mr. Bingel have also mistakenly assumed that the poles ComEd

¹⁶² *Id.* at ¶16.

¹⁶³ *Id.* at ¶17.

¹⁶⁴ *Id.* at ¶18.

¹⁶⁵ 2017 NATIONAL ELECTRICAL SAFETY CODE, Rule 010.B. and 010.C. (Apr. 26, 2016); D’Hooge Declaration at ¶27.

¹⁶⁶ D’Hooge Declaration at ¶19.

¹⁶⁷ See Declaration of Nelson Bingel, attached to Crown Castle Pole Attachment Complaint at Attachment E, at ¶13 (CCF000325-CCF000326).

¹⁶⁸ D’Hooge Declaration at ¶22.

designates as “Priority” poles are poles that endanger life or property. Such poles must “promptly” be “repaired, disconnected, or isolated,” if one properly cites the 2002 NESC in effect in Illinois, or must “promptly” be “corrected, disconnected, or isolated” if one incorrectly cites the 2017 edition of the NESC, as does Mr. Bingel. Contrary to the incorrect assumption of Crown Castle and Mr. Bingel, however, ComEd’s “Priority” red-tagged poles are not such poles that must “promptly” be “repaired, disconnected, or isolated.”

Instead, in the regular course of business, ComEd performs regular pole inspections. Any pole which upon inspection is found to present a danger to life or property is promptly repaired, disconnected or isolated, in accordance with NESC Rule 214.A.5 in effect in Illinois. Any other pole which upon inspection is found to have deteriorated below original strength by more than 33% is “red tagged” and deemed a “reject pole,” consistent with Table 261-1A of the 2002 NESC in effect in Illinois.¹⁶⁹ Poles exhibiting this deterioration or any other defect in the course of inspection are recorded, and such records of defects are maintained until the defects are corrected, in accordance with NESC Rule 214.A.4 in effect in Illinois.¹⁷⁰

At ComEd any poles or other structures which are found to pose an immediate safety hazard are mitigated with immediate resource commitment toward isolation, repair or replacement to remove the hazard. Conditions related to wider infrastructure operation and maintenance are responsibly prioritized, managed and executed.¹⁷¹

Crown Castle 43: *Since May 2017, ComEd has responded to Crown Castle’s applications to attach to 1,202 poles (987 poles for fiber attachments and 215 poles for wireless attachments) by denying access to the poles on the ground that the poles were “red tagged.”*

ComEd Answer: ComEd cannot respond to this paragraph 43 because ComEd does not know what Crown Castle means by the phrase “ComEd has responded to.”

Crown Castle 44: *ComEd will not allow Crown Castle to attach its fiber or wireless nodes to a “red tag” pole unless Crown Castle first pays to replace the pole with, at minimum, a Class 1 pole, or, in very limited circumstances, to reinforce the pole.*

ComEd Answer: ComEd’s design criteria specifies that all new and replaced structures be designed to NESC Grade B standards, and this design criteria applies whether the new facilities are being attached by ComEd or any other entity. Noting that it is less expensive to install a Class 1 pole than to utilize another class of pole and fully engineering the pole with a complete load study, a practice was temporarily followed in an attempt to generally achieve Grade B without fully engineering it. The rationale for this practice was that the cost of the load study and engineering and design work exceeds the difference in cost between a Class 1 and a Class 2 pole and performing a load study slowing down the new attachment process. When this practice was reviewed by

¹⁶⁹ 2002 NATIONAL ELECTRICAL SAFETY CODE, Table 261-1A (2001).

¹⁷⁰ Arns Declaration at ¶5.

¹⁷¹ D’Hooge Declaration at ¶6.

distribution standards it was determined to be inconsistent with company design standard requirements and resultant from a human performance element the company is following up on internally.¹⁷²

Crown Castle 45: *Of the 987 red tagged poles to which Crown Castle has proposed to attach fiber, ComEd has designated 862 poles for replacement, ComEd has designated 66 poles for reinforcement, and 59 poles have not been designated for replacement or reinforcement as of April 30, 2019.*

ComEd Answer: ComEd believes the Exhibit 3 list provided by Crown Castle shows 976 red tagged poles, 894 designated for replacement, and 82 designated for reinforcement, leaving one not designated for replacement or reinforcement.¹⁷³

Crown Castle 46: *ComEd has designated for replacement all 215 red tagged poles to which Crown Castle has proposed to attach wireless nodes.*

ComEd Answer: ComEd believes the Exhibit 3 list provided by Crown Castle shows 214 red tagged poles to which Crown Castle has proposed to attach wireless nodes.¹⁷⁴

Crown Castle 47: *ComEd has not provided Crown Castle the information or opportunity to assess whether these “red tag” poles in fact require replacement or reinforcement.*

ComEd Answer: ComEd cannot recall whether Crown Castle has requested such information or whether ComEd has orally provided at least a general description of the criteria used for designating poles as priority/non-priority or restorable/replacement. A detailed, accurate description of ComEd’s program can be quite complicated with many variants and different inspection methods, and ComEd’s program depends on information such as wood species, original treatment type, setting medium, accessibility, presence of other underground facilities, pole height, electric capacity, effective circumference, pole defects (e.g., splits, woodpecker holes, cracks), service attachments, the impact on electric distribution customers, and other factors. It should also be noted that ComEd’s pole inspections are currently outsourced to Osmose Utility Services, Inc., using Osmose load calculation software and using Osmose pole treatment services. This is the company with which Crown Castle’s expert Mr. Bingel was employed for 30 years. ComEd’s specification for pole maintenance services is shared with its pole co-owners, sister companies, and its service provider. Beyond that, these are treated as internal proprietary documents.¹⁷⁵

Crown Castle 48: *Although Crown Castle has repeatedly requested that ComEd explain the reason why any given pole is marked as “red tagged,” or designated as Priority versus Non-Priority, or Restorable versus Non-Restorable, ComEd has not provided a clear and complete explanation of the standards, criteria, or basis for its red tag designations nor for the red tag*

¹⁷² Arns Declaration at ¶14.

¹⁷³ Herrera Declaration at ¶4.

¹⁷⁴ Herrera Declaration at ¶10.

¹⁷⁵ D’Hooe Declaration at ¶7.

status of any given pole to which access was denied. As a result, the basis for ComEd's labeling of poles as "red tagged" is still not clear.

ComEd Answer: ComEd cannot recall whether Crown Castle has requested such information and Crown has provided no evidence of "repeated requests." ComEd cannot recall whether ComEd has orally provided at least a general description of the criteria used for "red tagging" poles and for designating poles as priority/non-priority or restorable/replacement. However, a detailed, accurate description of ComEd's program can be quite complicated with many variants and different inspection methods, and ComEd's program depends on information such as wood species, original treatment type, setting medium, accessibility, presence of other underground facilities, pole height, electric capacity, effective circumference, pole defects (e.g., splits, woodpecker holes, cracks), service attachments, the impact on electric distribution customers, and other factors. It should also be noted that ComEd's pole inspections are currently outsourced to Osmose Utility Services, Inc., using Osmose load calculation software and using Osmose pole treatment services. This is the company with which Crown Castle's expert Mr. Bingel was employed for over 30 years. ComEd's specification for pole maintenance services is shared with its pole co-owners, sister companies, and its service provider. Beyond that, these are treated as internal proprietary documents.¹⁷⁶

Crown Castle 49: *ComEd's make-ready invoices also do not reveal any rationale for labeling a pole with a "red tag."*

ComEd Answer: ComEd admits the allegations in Paragraph 49.

Crown Castle 50: *Upon information and belief, ComEd has developed a database that contains detailed information about its "red tag" poles. ComEd has refused to provide Crown Castle with access to this database.*

ComEd Answer: ComEd has a database containing information about its poles that have been inspected, and Osmose provides the input information for the database. It is possible to query the database to identify which of those poles are red tagged. Crown Castle may have asked for access to this database to easily engineer its fiber routes. ComEd believes it responded by stating the information is confidential, and that Crown Castle must in any event survey the poles before they submit an application. ComEd's system is critical infrastructure and ComEd cannot and does not provide such sensitive information about its pole plant to outside parties like Crown Castle.¹⁷⁷

Crown Castle 51: *In addition to failing to provide an explanation of the standards used to apply a "red tag" to a pole, or to provide specific information regarding each pole to which ComEd has denied Crown Castle access based on "red tag" status, ComEd refuses to identify the locations of red-tagged poles prior to Crown Castle's submission of pole attachment applications. As a result, Crown Castle is unable to design its deployment so as to avoid red tagged poles, if possible.*

¹⁷⁶ *Id.* at ¶7.

¹⁷⁷ Tyschenko Declaration at ¶8.

ComEd Answer: ComEd denies the allegations in this paragraph. The Complaint's Declaration of Maureen Whitfield attaches Exelon's Technical Bulletin which identifies the pole tags associated with red-tagged poles.¹⁷⁸ A pole's red-tagged status is easily discernable through a simple visual evaluation of poles across routes.

Crown Castle 52: *On information and belief, if ComEd had corrected the cause of the red tag status in a reasonable, appropriate, and timely manner, some and possibly all of the poles that ComEd has denied access to based on red tag status would not have required replacement or reinforcement to accommodate Crown Castle's attachment.*

ComEd Answer: ComEd denies the allegations in this paragraph because red tagged poles are being corrected in a reasonable, appropriate, and timely manner.¹⁷⁹ In the course of regular pole inspections, any pole which is found to present a danger to life or property is promptly repaired, disconnected or isolated, in accordance with NESC Rule 214.A.5 in effect in Illinois.¹⁸⁰ Immediately upon inspection, "non-priority" poles are treated with a product from Osmose in order to control the decay, maintain the asset, and "extend the useful life" of the pole.¹⁸¹ Following this treatment, "non-priority" poles are routinely reinforced or replaced whenever any entity (including ComEd) wants to upgrade facilities, add additional facilities to the pole, or subsequent inspection adjusts priority.¹⁸²

Crown Castle 53: *In addition, because ComEd's red tagging is based on physical inspection only, with no analysis of actual loading on the pole, it is possible that some or many of ComEd's red tagged poles should not be labeled red tagged and could accommodate Crown Castle's attachments. ComEd is denying Crown Castle access to poles without performing an analysis of the actual loading of the pole.*

ComEd Answer: ComEd denies the allegations in this paragraph. ComEd is not denying Crown Castle access to any red tagged poles. Like every other attacher (including ComEd itself), Crown Castle can attach to any red tagged pole by paying to have the pole replaced or reinforced.

This conclusion is based on Mr. Bingel's earlier analysis at paragraph 12 of his Declaration. Contrary to his assertions in that paragraph, he has failed to state the "exact requirement" of the NESC, as adopted in Illinois. Footnote 2 of Table 261-1A of the 2002 NESC that has been adopted in Illinois does not include the term "actual loading" or anything like it. What the referenced footnote from the applicable (2002) NESC does is call for repair or replacement when the strength is reduced to "2/3 of that required

¹⁷⁸ Declaration of Maureen A. Whitfield, attached to Crown Castle Pole Attachment Complaint at Attachment D, Exhibit 1 (CCF000143-CCF000147).

¹⁷⁹ Tyschenko Declaration at ¶9.

¹⁸⁰ Arns Declaration at ¶4.

¹⁸¹ There is an exception for treatment in that poles located on school properties, parks, playgrounds, and in wetlands do NOT receive a groundline treatment. D'Hooge Declaration at ¶11.

¹⁸² Arns Declaration at ¶11.

when installed.”¹⁸³ The term “that required” could be interpreted to suggest actual loading, however actual loading would also involve accounting for any facilities that may have been added or removed in the intervening years. But, “when installed” precludes accounting for these changes. At a minimum, the term “actual loading” would be too broad an interpretation.¹⁸⁴

Perhaps Mr. Bingel is instead again mistakenly referencing the 2017 NESC which has not been adopted in Illinois and which revised this footnote to allow the incorporation of modified loads. Whatever the case, and whether or not Mr. Bingel’s interpretation of the 2017 NESC is correct, the term “actual loading” is not an appropriate term to refer to the 2002 NESC in effect in Illinois. As such, Mr. Bingel’s argument that relies a half dozen times on the phrase “actual loading” is misdirected and misinformed with respect to the NESC in Illinois.¹⁸⁵

Not only is this reliance on “actual loading” inappropriate in the state of Illinois, it forms the basis of a self-serving and contradictory suggestion by Crown Castle. Using Mr. Bingel’s mistaken Declaration for support, Crown and Mr. Bingel suggest that loading studies can and do confirm a “red tag” pole is available for new attachments: “when the actual loading for a pole is determined, the pole may actually be available for attachment because under the NESC the remaining strength must exceed two-thirds of the strength required to support the loading actually on the pole.”¹⁸⁶ Later in the paragraph, however, they both state that it is not a common industry practice for this kind of analysis to be performed: “the practice of analyzing the actual load on a red tag pole to see if it still meets code requirements is not widely applied in the industry today.”¹⁸⁷

Crown Castle is therefore trying to use a nonexistent provision of the NESC in Illinois to convince the Commission that ComEd should perform a pole loading study that Crown Castle believes few in the industry perform in order to allow Crown Castle to attach its facilities to poles that have been red tagged.¹⁸⁸

Crown Castle also assumes a level of precision surrounding the inspection company’s strength estimation and their load calculation that is not warranted. Each of these assessments is no more than an imprecise determination, the manipulation of which results in an even less precise determination. It is therefore appropriate for ComEd to determine that a pole which has failed inspection because it was shown to be deteriorated should not support additional facilities, even if an imprecise loading study later suggests it might possibly withstand additional load.¹⁸⁹

Moreover, even if the NESC in effect in Illinois would make the sections covering 214.A.5.a and 214.A.5.b of the NESC Handbook applicable, and even if the unusual

¹⁸³ 2002 NATIONAL ELECTRICAL SAFETY CODE, Table 261-1A n.2 (2001)

¹⁸⁴ D’Hooe Declaration at ¶14.

¹⁸⁵ *Id.* at ¶15.

¹⁸⁶ *Id.* at ¶16.

¹⁸⁷ *Id.* at ¶16.

¹⁸⁸ *Id.* at ¶17.

¹⁸⁹ *Id.* at ¶18.

loading studies Crown proposes were more precise, it would be inappropriate to require utilities to design and operate their systems in accordance with the minimum standards of the NESC. As explained in the first section of the NESC, the NESC contains “basic provisions” necessary for safety, and “is not intended as a design specification or as an instruction manual.”¹⁹⁰

To establish its engineering and design practices, many of which exceed NESC minimum code compliances, ComEd must factor in considerations related to reliability, resiliency, and planning, the safety of all those working on its poles, and the safe and efficient operation of its pole plant as a whole. It is unworkable and unsafe as a practical matter, and thus a very poor engineering and design practice, to design down to minimum code compliance without assessing these numerous other factors that affect the safety, efficiency and reliability of the system.¹⁹¹

Crown Castle 54: *From June 2017 to March 2019, ComEd would permit attachment to “red tag” poles if and only if Crown Castle replaced the pole; ComEd did not give Crown Castle the option to reinforce the poles.*

ComEd Answer: ComEd admits the allegations in Paragraph 54 of the Complaint.

The determination whether to replace or reinforce a pole is a design decision driven by the location of the decay, the size of the decay, the location of risers, the direction of the load, the extent of electric facilities, the height of the banding, whether the pole top is decayed, whether there are woodpecker holes, and dozens of other factors.¹⁹²

It would be inappropriate to require utilities to design and operate their systems in accordance with the minimum standards of the NESC. As explained in the first section of the NESC, the NESC contains “basic provisions” necessary for safety, and “is not intended as a design specification or as an instruction manual.”¹⁹³

Crown Castle 55: *Upon information and belief, during the time period of June 2017 to March 2019, and before, for attachment of its own facilities, ComEd remedied “red tag” poles through reinforcement in some cases rather than pole replacement in every case. At the same time, however, ComEd refused to allow Crown Castle the same option of reinforcing red tagged poles that could be remedied through reinforcement, and instead, demanded that Crown Castle replace every red tagged pole with a minimum Class 1 pole.*

ComEd Answer: From June 2017 to March 2019, and before, for attachment of its own facilities, ComEd remedied “red tag” poles through reinforcement in some cases rather than pole replacement in every case.¹⁹⁴

¹⁹⁰ 2017 NATIONAL ELECTRICAL SAFETY CODE, Rule 010.B. and 010.C. (Apr. 26, 2016); D’Hooge Declaration at ¶27.

¹⁹¹ D’Hooge Declaration at ¶19.

¹⁹² Arns Declaration at ¶5.

¹⁹³ 2017 NATIONAL ELECTRICAL SAFETY CODE, Rule 010.B. and 010.C. (Apr. 26, 2016).

¹⁹⁴ Arns Declaration at ¶16.

ComEd's policy was not to allow third parties like Crown Castle to reinforce poles during this same period based on a discretionary judgment. In any event, only a small subset of red-tagged poles might qualify under the same guidelines to be reinforced.¹⁹⁵

ComEd's design criteria specifies that all new and replaced structures be designed to NESC Grade B standards, and this design criteria applies whether the new facilities are being attached by ComEd or any other entity. Noting that it is less expensive to install a Class 1 pole than utilizing another class of pole and fully engineering the pole with a complete load study, a practice was temporarily followed in an attempt to generally achieve Grade B without fully engineering it. The rationale for this practice was that the cost of the load study and engineering and design work exceeds the difference in cost between a Class 1 and a Class 2 pole and performing a load study slowing down the new attachment process. When this practice was reviewed by distribution standards it was determined to be inconsistent with company design standard requirements and resultant from a human performance element the company is following up on internally.¹⁹⁶

Crown Castle 56: *While ComEd has permitted Crown Castle to reinforce some “red tag” poles since March 2019, ComEd continues to require Crown Castle to replace the overwhelming majority of “red tag” poles, and it requires that the poles be replaced with a larger class pole in every case.*

ComEd Answer: The determination whether to replace or reinforce a pole is a design decision driven by the location of the decay, the size of the decay, the location of risers, the direction of the load, the extent of electric facilities, the height of the banding, whether the pole top is decayed, whether there are woodpecker holes, and dozens of other factors.¹⁹⁷

A large part of the reason Crown Castle must replace the overwhelming majority of “red tag” poles rather than reinforce them is because two-thirds of the distribution poles in Chicago are three-phase poles, which carry a lot of electric load and which affect a large number of electric customers, and most of Crown Castle's attachments are in Chicago and similarly population dense areas. Because of the importance of these poles, the need to maximize reliability and resiliency for the extensive customers they serve, ComEd's nondiscriminatory policy is that red-tagged three-phase poles must be replaced, not just for Crown Castle but for ComEd and any other entity seeking to install new facilities.¹⁹⁸

It would be inappropriate to require utilities to design and operate their systems in accordance with the minimum standards of the NESC. As explained in the first section of the NESC, the NESC contains “basic provisions” necessary for safety, and “is not intended as a design specification or as an instruction manual.”¹⁹⁹

¹⁹⁵ *Id.* at ¶17.

¹⁹⁶ *Id.* at ¶14.

¹⁹⁷ *Id.* at ¶15.

¹⁹⁸ *Id.* at ¶18.

¹⁹⁹ 2017 NATIONAL ELECTRICAL SAFETY CODE, Rule 010.B. and 010.C. (Apr. 26, 2016).

ComEd's design criteria specifies that all new and replaced structures be designed to NESC Grade B standards, and this design criteria applies whether the new facilities are being attached by ComEd or any other entity. Noting that it is less expensive to install a Class 1 pole than utilizing another class of pole and fully engineering the pole with a complete load study, a practice was temporarily followed in an attempt to generally achieve Grade B without fully engineering it. The rationale for this practice was that the cost of the load study and engineering and design work exceeds the difference in cost between a Class 1 and a Class 2 pole and performing a load study slowing down the new attachment process. When this practice was reviewed by distribution standards it was determined to be inconsistent with company design standard requirements and resultant from a human performance element the company is following up on internally.²⁰⁰

Crown Castle 57: *Crown Castle should not bear the cost of replacing or reinforcing any red tagged poles.*

ComEd Answer: Because Crown Castle can access red tagged poles prior to the end of the useful life of those poles, and because capacity is being expanded to accommodate Crown Castle's proposed attachments, the pole replacement or reinforcement is for the benefit of Crown Castle, just as it would be for the benefit of any other entity, including ComEd, which might seek to install new facilities on a red tagged pole and must, like Crown Castle, pay the cost of the pole replacement or reinforcement.

Crown Castle 58: *ComEd has even required Crown Castle to pay for pole replacement after it granted attachment applications. In October and November 2017, ComEd issued permits to Crown Castle for attachments to 35 poles. Subsequently, ComEd rescinded those permits and declared that the poles were being "red tagged." As a result, Crown Castle was required pay \$484,059.93 to replace the 35 poles.*

ComEd Answer: ComEd admits the allegations in Paragraph 58 of the Complaint. The issue with the permits for these 35 poles is that an intern at ComEd mistakenly authorized ComEd's Real-Estate Department to release the permits for these applications, even though attachment was inappropriate because the applications contained 35 poles required make-ready.²⁰¹

Crown Castle 59: *Until May 2019, ComEd had allowed Crown Castle to install temporary attachments on some red-tagged poles as an interim solution to delays associated with pole replacements; however, in May 2019, ComEd instituted a policy prohibiting all temporary attachments to "red tag" poles. This ban on temporary attachments to red tag poles effectively denies Crown Castle access to ComEd's "red tag" poles and will prevent Crown Castle from deploying its telecommunications equipment in a timely fashion.*

ComEd Answer: ComEd admits that until May 2019, ComEd had allowed Crown Castle to install temporary attachments on some red-tagged poles on a case-by-case basis, but ComEd still required Crown Castle to replace the pole. This practice was

²⁰⁰ Arns Declaration at ¶14.

²⁰¹ Declaration of Daryl G. Richardson at ¶3, attached hereto at Attachment J.

inconsistent with the company design standard requirement and resulted from a human performance element the company is following up on internally. In May 2019, ComEd's Distribution Standards department was asked to review this practice and from that time forward disallowed the practice because no one on ComEd's system, including ComEd, is allowed to install new temporary attachments on red-tagged poles. ComEd does not allow this practice for its own facilities and it does not allow it for other entities either.²⁰²

Crown Castle 60: *Crown Castle requested executive-level intervention from ComEd's leadership to end this temporary attachment restriction. On May 22, 2019, ComEd denied this request and affirmed its position on temporary attachments to red tag poles.*

ComEd Answer: ComEd admits the allegations in Paragraph 60 of the Complaint, although it cannot verify the May 22, 2019 date.

Crown Castle 61: *Fundamentally, with its red tag policy, ComEd is denying Crown Castle access to ComEd poles unless Crown Castle pays for the correction of preexisting issues that were not caused by Crown Castle, and, essentially, is forcing Crown Castle to pay to refurbish and improve ComEd's pole plant.*

ComEd Answer: Because Crown Castle can access red tagged poles prior to the end of the useful life of those poles, and because capacity is being expanded to accommodate Crown Castle's proposed attachments, the pole replacement or reinforcement is for the benefit of Crown Castle, just as it would be for the benefit of any other entity, including ComEd, which might seek to install new facilities on a red tagged pole and must, like Crown Castle, pay the cost of the pole replacement or reinforcement.

All poles have "preexisting issues." But importantly, these poles do not have "preexisting safety violations." The "red tagged" poles that Crown Castle references in this proceeding do not qualify as "red tagged" poles as defined by the Commission in footnote 450 of the OTMR Order. The OTMR Order defines a "red tagged" pole as one that is "found to be non-compliant with safety standards."²⁰³ The poles at issue in this proceeding do not violate safety standards as Crown Castle would like the Commission to believe.

Instead, as explained above, in the regular course of business, ComEd performs regular pole inspections. Any pole which upon inspection is found to present a danger to life or property is promptly repaired, disconnected or isolated, in accordance with NESC Rule 214.A.5 in effect in Illinois. Any other pole which upon inspection is found to have deteriorated below original strength by more than 33% is "red tagged" and deemed a "reject pole," consistent with Table 261-1A of the 2002 NESC in effect in Illinois.²⁰⁴ Poles exhibiting this deterioration or any other defect in the course of inspection are recorded, and such records of defects are maintained until the defects are corrected, in

²⁰² Arns Declaration at ¶19.

²⁰³ OTMR Order at n.450.

²⁰⁴ 2002 NATIONAL ELECTRICAL SAFETY CODE, Table 261-1A (2001).

accordance with NESC Rule 214.A.4 in effect in Illinois. This activity is in accordance with the NESC, not a violation of the NESC.²⁰⁵

The Complaint does not demonstrate any NESC violations. Crown cites the 2017 edition of the NESC at Rules 214.A.5.a. and b. which (as explained above) are not in effect in Illinois, but nevertheless ComEd's practices do not violate these provisions anyway. And, as explained above, ComEd's practices also do not violate the 2002 Code Section that actually is in effect in Illinois, but which was not even addressed by the Complaint. ComEd has not failed to replace or reinforce these poles in a timely manner, and so the NESC has not been violated.²⁰⁶

Because the poles in this proceeding do not have preexisting safety violations, they are not the same "red tagged" poles defined in the OTMR Order. As a result, the OTMR Order provisions applicable to "red tagged" poles do not apply.

The poles at issue in this proceeding are at full capacity based on ComEd's engineering and reliability standards, which ComEd imposes on all attachers including itself in a nondiscriminatory manner. For new attachments to be accommodated, ComEd must expand capacity by installing a replacement pole (or by reinforcing the existing pole, if appropriate). In most cases, therefore, Crown Castle is asking that the Commission require ComEd to expand capacity to accommodate Crown Castle's attachment requests. It has been long established, however, that the Commission cannot require utilities to expand capacity by installing taller poles.

The Pole Attachment Act allows utilities to deny access for lack of capacity:

Notwithstanding paragraph (1), a utility providing electric service may deny a cable television system or any telecommunications carrier access to its poles, ducts, conduits, or rights-of-way, on a non-discriminatory basis where there is insufficient capacity and for reasons of safety, reliability and generally applicable engineering purposes.²⁰⁷

Accordingly, electric utilities need not expand capacity to accommodate attaching entities.²⁰⁸ The Commission agrees. As explained in the April 2011 Pole Attachment

²⁰⁵ See Arns Declaration at ¶¶4-5.

²⁰⁶ See *id.* at ¶¶4-5.

²⁰⁷ 47 U.S.C. §224(f)(2) (2010).

²⁰⁸ This determination has been upheld by the 11th Circuit. In *Southern Company v. FCC*, utility petitioners objected to the Commission's 1999 decision that "utilities must expand pole capacity to accommodate requests for attachment in situations where it is agreed that there is insufficient capacity on a given pole to permit third-party pole attachments." *Southern Co. v. FCC*, 292 F.3d 1338, 1347 (11th Cir. 2002), quoting *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499 (1996), *aff'd*, Order on Reconsideration, 14 FCC Rcd 18049 (1999). The 11th Circuit held that the plain language of Section 224(f)(2) explicitly prevents the Commission from mandating pole replacements: "When it is agreed that capacity is insufficient, there is no obligation to provide third parties with access to that particular 'pole, duct, conduit, or right-of-way.'" *Southern Co. v. FCC*, 292 F.3d 1338, 1347 (11th Cir. 2002). The court further noted that "the FCC's attempt to mandate capacity expansion is outside of its purview under the plain language of the statute." *Id.*

Order: “[A]s the court noted in *Southern Company*, mandating the construction of new capacity is beyond the Commission’s authority.”²⁰⁹

The poles at issue in this proceeding that have been “red tagged” for later replacement are poles that the NESC does not require to be replaced right away, as they do not endanger life or property, and have been treated to maintain and extend their present reliable state of service. As such, Crown Castle’s request for a ruling that they be replaced immediately is a rule requiring utilities to expand capacity, which the Pole Attachment Act prohibits. Consistent with the Pole Attachment Act, Crown Castle’s request for capacity expansion should be denied.

a) Red Tag Costs for Fiber Attachments

As explained in ComEd’s answers to Paragraphs 62-67 below, ComEd has not denied Crown Castle access to red tagged poles, but instead allows Crown Castle to gain access by paying to replace or, if appropriate, reinforce the pole. ComEd’s policies are neither unreasonable nor unlawful and must factor in considerations related to reliability, resiliency, and planning, the safety of all those working on its poles, and the safe and efficient operation of its pole plant as a whole. And ComEd believes it has timely processed Crown Castle’s application for pole attachments given ComEd’s considerable constraints.

Crown Castle 62: *As noted above, of the 19,651 poles to which Crown Castle has applied to attach fiber, as of April 30, 2019, ComEd has responded by denying access on the ground that 987 of the poles were red tagged.*

ComEd Answer: ComEd denies the allegations in this paragraph. ComEd has not denied Crown Castle access to red tagged poles, but instead allows Crown Castle to gain access by paying to replace or, if appropriate, reinforce the pole. In addition, Crown Castle has other options to deploy its facilities, including by installing its facilities underground, and by using the streetlights and other facilities owned by the City of Chicago and other municipalities located in ComEd’s service territory.²¹⁰ ComEd cannot respond to the remainder of this paragraph because ComEd does not know which 19,651 poles Crown Castle is referring to.²¹¹

Crown Castle 63: *Of these 987 red tagged poles, as of April 30, 2019, ComEd has required replacement of 862 poles, reinforcement of 66 poles, and has not yet designated 59 poles for replacement or reinforcement.*

ComEd Answer: ComEd believes the Exhibit 3 list provided by Crown Castle shows 976 red tagged poles, 894 designated for replacement, and 82 designated for

²⁰⁹ April 2011 Pole Attachment Order at ¶ 95.

²¹⁰ Herrera Declaration at ¶8.

²¹¹ Declaration of Michael S. Mann at ¶5, attached hereto at Attachment K (hereinafter “Mann Declaration”).

reinforcement, leaving one not designated for replacement or reinforcement.²¹²

Crown Castle 64: *As of April 30, 2019, ComEd had sent Crown Castle invoices alleging that the cost to replace the 862 red tagged poles for fiber attachments is \$11,625,206 and the cost to reinforce 66 red-tagged poles is \$85,758.*

ComEd Answer: ComEd believes the Exhibit 3 list provided by Crown Castle shows 976 red tagged poles, 894 designated for replacement, and 82 designated for reinforcement. ComEd believes the invoices for the replacements total [REDACTED] and the invoices for the reinforcements total [REDACTED].²¹³

Crown Castle 65: *Despite its disagreement with the red tag charges, through April 30, 2019, Crown Castle has paid ComEd \$11,202,608 for 830 of 862 red tag pole replacements and \$85,758 for all 66 red tag pole reinforcements to allow Crown Castle to attach fiber optic lines.*

ComEd Answer: ComEd believes the Exhibit 3 list provided by Crown Castle shows 976 red tagged poles, 894 designated for replacement, and 82 designated for reinforcement. ComEd believes that Crown Castle through April 30, 2019 has paid [REDACTED] for the replacements and [REDACTED] for the reinforcements.²¹⁴

Crown Castle 66: *If Crown Castle had not paid ComEd the invoiced amounts for replacement or reinforcement of red tagged poles, Crown Castle would have been denied access to those ComEd poles, effectively halting Crown Castle's network deployment.*

ComEd Answer: ComEd denies the allegations in this paragraph. ComEd has not denied Crown Castle or other entities access to its red tagged poles because Crown Castle and other entities (including ComEd) can pay the cost of replacing or reinforcing those poles whenever they need access. In addition, Crown Castle has other options to deploy its facilities, including by installing its facilities underground, and by using the streetlights and other facilities owned by the City of Chicago and other municipalities located in ComEd's service territory.²¹⁵

Crown Castle 67: *The unreasonable and unlawful requirement to pay for correction of red tag poles will continue because Crown Castle, in order to complete its planned build, needs to attach to thousands more ComEd poles. Indeed, as of April 30, 2019, Crown Castle still had applications outstanding for more than 6,700 ComEd poles that ComEd had not acted on within the Commission's timeframes, plus additional applications that are still pending but have not yet exceeded the Commission's timelines, and Crown Castle will need to attach to more poles for which Crown Castle has not yet submitted applications.*

ComEd Answer: ComEd denies the allegations in Paragraph 67. ComEd's policies are neither unreasonable nor unlawful and must factor in considerations related to reliability,

²¹² Herrera Declaration at ¶4.

²¹³ *Id.* at ¶5.

²¹⁴ *Id.* at ¶6.

²¹⁵ *Id.* at ¶8.

resiliency, and planning, the safety of all those working on its poles, and the safe and efficient operation of its pole plant as a whole.²¹⁶

ComEd has not denied Crown Castle access to red tagged poles, but instead allows Crown Castle to gain access by paying to replace or, if appropriate, reinforce the pole. In addition, Crown Castle has other options to deploy its facilities, including by installing its facilities underground, and by using the streetlights and other facilities owned by the City of Chicago and other municipalities located in ComEd's service territory.²¹⁷

As stated in ComEd's answers to Paragraph 75 and Paragraph 99, ComEd believes it has timely processed Crown Castle's application for pole attachments given ComEd's considerable constraints.²¹⁸ In 2018, ComEd utilized [REDACTED] full time equivalent employees for back office third party attachment support. In early 2019, it progressed to [REDACTED] full time equivalent employees, and is now at [REDACTED] full time equivalent employees for July. With increased resources and favorable weather for make ready work, May-June completions were 300% higher for Crown Castle than the first four months of 2019. Additionally, ComEd proactively reached out to multiple contractors to solicit additional resources and offered overtime for its internal workforce as well as the contractors.²¹⁹

Out of the 6,701 poles listed in Attachment D, Exhibit 12 of Crown Castle's Complaint, 21 poles were cancelled by Crown Castle; 652 poles require payment from Crown Castle; 47 poles are on hold pending updated information from Crown Castle; less than 193 days has elapsed between the date of submission and April 30, 2019 for 372 poles. More than 193 days elapsed between the date of submission and April 30, 2019 for only 5,604 red tag poles associated with attachment applications.²²⁰

b) Red Tag Costs For Wireless Attachments

As explained in ComEd's answers to Paragraphs 68-74 below, because Crown Castle can access red tagged poles prior to the end of the useful life of those poles, and because capacity is being expanded to accommodate Crown Castle's proposed attachments, the pole replacement or reinforcement is for the benefit of Crown Castle, just as it would be for the benefit of any other entity, including ComEd, which might seek to install new facilities on a red tagged pole and must, like Crown Castle, pay the cost of the pole replacement or reinforcement.

ComEd's policies are neither unreasonable nor unlawful and must factor in considerations related to reliability, resiliency, and planning, the safety of all those working on its poles, and the safe and efficient operation of its pole plant as a whole. And ComEd believes it has timely processed Crown Castle's application for pole attachments given ComEd's considerable constraints.

²¹⁶ *Id.* at ¶7.

²¹⁷ *Id.* at ¶8.

²¹⁸ Mann Declaration at ¶8.

²¹⁹ *Id.* at ¶16.

²²⁰ Herrera Declaration at ¶9.

Crown Castle 68: *As noted above, ComEd has denied access to two hundred fifteen (215) poles for wireless attachments on the grounds that the poles were red tagged.*

ComEd Answer: ComEd denies the allegations in Paragraph 68. ComEd has not denied Crown Castle access to red tagged poles, but instead allows Crown Castle to gain access by paying to replace or, if appropriate, reinforce the pole. In addition, Crown Castle has other options to deploy its facilities by using the streetlights and other facilities owned by the City of Chicago and other municipalities located in ComEd's service territory.²²¹

As stated in ComEd's answers to Paragraph 75 and Paragraph 99, ComEd believes it has timely processed Crown Castle's application for pole attachments given ComEd's considerable constraints.²²² In 2018, ComEd utilized [REDACTED] full time equivalent employees for back office third party attachment support. In early 2019, it progressed to [REDACTED] full time equivalent employees, and is now at [REDACTED] full time equivalent employees for July. With increased resources and favorable weather for make ready work, May-June completions were 300% higher for Crown Castle than the first four months of 2019. Additionally, ComEd proactively reached out to multiple contractors to solicit additional resources and offered overtime for its internal workforce as well as the contractors.²²³

ComEd believes the Exhibit 3 list provided by Crown Castle shows 214 red tagged poles to which Crown Castle has proposed to attach wireless nodes.²²⁴

Crown Castle 69: *ComEd has sent Crown Castle invoices alleging that the cost to replace those 215 red tagged poles for wireless attachments is \$3,023,441.*

ComEd Answer: ComEd believes the Exhibit 3 list provided by Crown Castle shows 214 red tagged poles to which Crown Castle has proposed to attach wireless nodes.²²⁵ The invoices for the cost to replace these 214 red tagged poles for wireless attachments total [REDACTED].²²⁶

Crown Castle 70: *Despite its disagreement with the "red tag" charges, through April 30, 2019, Crown Castle has paid ComEd \$2,923,906 for replacement of 210 of the 215 red tagged poles to allow Crown Castle to attach wireless equipment.*

ComEd Answer: ComEd believes the Exhibit 3 list provided by Crown Castle shows 214 red tagged poles to which Crown Castle has proposed to attach wireless nodes.²²⁷ Crown Castle has paid invoices through April 30, 2019, for 206 of these 214 poles totaling [REDACTED].²²⁸

²²¹ *Id.* at ¶8.

²²² Mann Declaration at ¶8.

²²³ *Id.* at ¶16.

²²⁴ Herrera Declaration at ¶10.

²²⁵ *Id.* at ¶10.

²²⁶ *Id.* at ¶11.

²²⁷ *Id.* at ¶10.

²²⁸ *Id.* at ¶11.

Crown Castle 71: *If Crown Castle had not paid ComEd the invoiced amounts for replacement of red tagged poles, Crown Castle would have been denied access to those ComEd poles, effectively halting Crown Castle's network deployment.*

ComEd Answer: Because Crown Castle can access red tagged poles prior to the end of the useful life of those poles, and because capacity is being expanded to accommodate Crown Castle's proposed attachments, the pole replacement or reinforcement is for the benefit of Crown Castle, just as it would be for the benefit of any other entity, including ComEd, which might seek to install new facilities on a red tagged pole and must, like Crown Castle, pay the cost of the pole replacement or reinforcement.

ComEd denies that Crown Castle's network deployment is being halted. Crown Castle has other options to deploy its facilities, including by installing its facilities underground, and by using the streetlights and other facilities owned by the City of Chicago and other municipalities located in ComEd's service territory.

Crown Castle 72: *The unreasonable and unlawful requirement to pay for correction of red tag poles will continue because Crown Castle still needs permits to attach wireless facilities to hundreds more ComEd poles. Indeed, as of April 30, 2019, Crown Castle still has applications for 254 poles for which ComEd has not taken final action within the Commission's timelines, plus more applications for poles that have not yet exceeded the Commission's timeline, and Crown Castle will need to attach to more poles in the future for which it has not yet submitted applications.*

ComEd Answer: ComEd denies the allegations in Paragraph 72. ComEd's policies are neither unreasonable nor unlawful and must factor in considerations related to reliability, resiliency, and planning, the safety of all those working on its poles, and the safe and efficient operation of its pole plant as a whole.²²⁹

ComEd has not denied Crown Castle access to red tagged poles, but instead allows Crown Castle to gain access by paying to replace or, if appropriate, reinforce the pole. In addition, Crown Castle has other options to deploy its facilities, including by installing its facilities underground, and by using the streetlights and other facilities owned by the City of Chicago and other municipalities located in ComEd's service territory.²³⁰

As stated in ComEd's answers to Paragraph 75 and Paragraph 99, ComEd believes it has timely processed Crown Castle's application for pole attachments given ComEd's considerable constraints.²³¹ In 2018, ComEd utilized [REDACTED] full time equivalent employees for back office third party attachment support. In early 2019, it progressed to [REDACTED] full time equivalent employees, and is now at [REDACTED] full time equivalent employees for July. With increased resources and favorable weather for make ready work, May-June completions were 300% higher for Crown Castle than the first four months of 2019. Additionally,

²²⁹ *Id.* at ¶7.

²³⁰ *Id.* at ¶8.

²³¹ Mann Declaration at ¶8.

ComEd proactively reached out to multiple contractors to solicit additional resources and offered overtime for its internal workforce as well as the contractors.²³²

Out of the 254 poles listed in Attachment D, Exhibit 12 of Crown Castle's Complaint, 43 poles were submitted less than 223 days prior to April 30, 2019 and of those 43 poles, 24 have been permitted by ComEd. Moreover, six of the poles have been cancelled by Crown Castle; 10 poles are on hold pending updated information from Crown Castle; and 39 poles require payment from Crown Castle. More than 223 days elapsed between the date of submission and April 30, 2019 for only 156 poles.²³³

Crown Castle 73: *In fact, the financial burden will likely worsen. As of April 30, 2019, the average cost to replace a pole is approximately \$13,600 and the average cost to reinforce is approximately \$1,300 per pole. Yet, on May 30, 2019, ComEd issued invoices for 15 "red tag" pole replacements. The replacement costs have significantly increased, ranging from approximately \$21,000 per pole to \$29,000 per pole.*

ComEd Answer: ComEd denies the allegation that replacement costs have increased. The invoices issued May 30, 2019 were for poles that were particularly expensive due to additional scope. Invoice 18-2953-CN included two poles with transformer equipment and one T corner pole. Invoice 18-2955-CN included two transformer equipment poles. Invoice 18-3037-CN included two transformer poles. Invoice 18-0900-CN required installation of an alley arm, installation of a new pole top pin, the relocation of neutral/secondary, and relocation of services. Invoice 18-2777-CN included two poles with transformer equipment and one T corner pole.²³⁴

For poles with transformer equipment, one must run a ground up the pole, install another equipment arm for the cutout, install the transformer, make up all the connections on the transformer (primary and secondary side), test the transformer before restoring power back to customer. As a result, poles with transformers and equipment are a lot more work than a straight line pole.²³⁵

For T corner poles, the installation may require one to three phases on one and one to three phases coming in underneath off at a 90 degree angle. The utility has to extend the primary that is in the perpendicular position most of the time. Then all the primary wires have to be transferred energized because the utility cannot take an outage, due to the amount of customers on the line and that it feeds. This also means extra safety precautions have to be taken into account. Extra measures have to be taken to support strain from multiple directions before and during pole replacements.²³⁶

Crown Castle 74: *In total, to prevent ComEd's red tag practice from effectively stopping Crown Castle's network deployment, as of April 30, 2019, Crown Castle has paid ComEd a total of*

²³² *Id.* at ¶18.

²³³ Herrera Declaration at ¶13.

²³⁴ *Id.* at ¶14.

²³⁵ Mann Declaration at ¶6.

²³⁶ *Id.* at ¶7.

\$14,212,273 (for both wireline and wireless attachments) to correct preexisting conditions on red tag poles.

ComEd Answer: ComEd has not denied Crown Castle access to red tagged poles, but instead allows Crown Castle to gain access by paying to replace or, if appropriate, reinforce the pole. In addition, Crown Castle has other options to deploy its facilities, including by installing its facilities underground, and by using the streetlights and other facilities owned by the City of Chicago and other municipalities located in ComEd's service territory.²³⁷ As of April 30, 2019, Crown Castle has paid ComEd a total of [REDACTED] (for both wireline and wireless attachments) to replace red tag poles. ComEd denies that red tagged poles have "preexisting conditions." Instead, red tagged poles lack the capacity to accommodate the additional attachments, so capacity must be expanded by replacing or, if appropriate, reinforcing the red tag pole.²³⁸

2. ComEd's Processing of Attachment Permit Applications

As explained in ComEd's answers to Paragraphs 75-82 below, ComEd believes it has timely processed Crown Castle's application for pole attachments given ComEd's considerable constraints.

Crown Castle's forecasts of future activity were inaccurate and unreliable, and therefore could not be used by ComEd from planning perspective. It is very difficult to plan for either back office and line resources with such large variability from Crown Castle's projections.

FCC make-ready deadlines and other rules have not applied to Crown Castle's attachments to ComEd's poles in Illinois. The July 15 Bureau Order ruled that the FCC had jurisdiction over this Complaint, which has now caused ComEd to reexamine the applicability of FCC make-ready deadlines and other rules. Prior to that time, ComEd (and indeed Crown Castle) operated consistent with ICC jurisdiction, recognizing the ICC had jurisdiction.

Crown Castle 75: *Separate and apart from its denial of access to red tagged poles, ComEd has failed to timely process applications for pole attachments.*

ComEd Answer: ComEd denies that it has denied access to red tagged poles, since Crown Castle, like all other attachers including ComEd, can pay to replace or reinforce a red tagged pole to gain access. ComEd believes it has timely processed Crown Castle's application for pole attachments given ComEd's considerable constraints.²³⁹

ComEd is one of the largest electric utility companies in the nation, responsible for delivering safe and reliable power to 3.8 million homes and businesses across northern Illinois. The company manages a network of 90,000 miles of power lines, 1.3 million

²³⁷ Herrera Declaration at ¶8.

²³⁸ *Id.* at ¶15.

²³⁹ Mann Declaration at ¶8.

poles and 1,300 substations that make up the electrical infrastructure of the nation's third largest metropolitan region. As part of its core business, ComEd is a member of three mutual assistance groups coordinated through the Edison Electrical Institute (EEI).²⁴⁰

Third Party Attachments are a workstream that touches multiple departments and is not utility core work. Third Party Attachments are typically telecommunications companies that want to utilize utilities' existing infrastructure as an economical conduit to get to market with various communication technologies. With 5G technology there is competition that is creating large and volatile volume changes. Each application can request between 1 and 99 pole attachment locations with associated make ready work.²⁴¹

In 2012, ComEd received approximately 48 Third Party Attachment applications across the service territory compared to more than 4500 in 2018. The make ready work is now approximately 2000 pole replacements and approximately 27,000 pole attachments per year. In 2017 and 2018, the telecommunications companies were very guarded with their workplan projections, and with the volume spikes, ComEd manually polled many attachers to get directional forecasts on volumes. Originally, Crown Castle stated a 12-18 month build out and then in the fourth quarter of 2018 they stated that this was a multi-year (5+ years) sustainable effort.²⁴²

With the increase in Third Party Attachment volumes, ComEd created a flexible and scalable structure dedicated for the design portion of Third Party Attachments keeping the design function ahead of construction.²⁴³

In 2018, as part of ComEd's Edison Electric Institute commitment, ComEd sent crews for hurricane rebuilding efforts in Puerto Rico and Florida. In late 2018, ComEd applied additional resources to recover on make ready work however, ComEd experienced our own storm in late November. In early November of 2018 California started to rebuild their infrastructure due to a large fire and over the next few months started to pull nationally for qualified electrical workers.²⁴⁴

In 2019, California drew additional workers nationally by offering approximately 32 hours of overtime per week plus a generous per diem. Simultaneously, ComEd was challenged with supporting internal storms and mutual assistance mixed with extreme cold weather through early February of 2019, as part of our core work, and caused a slow down on make ready work. With a tight labor market, ComEd secured additional contracting crews and even allocated internal and external overtime while being impacted by what was in addition an abnormally wet spring. For the first quarter of 2019, ComEd has experienced six internal storm recovery activations and approximately 80 days of inclement weather.²⁴⁵

²⁴⁰ *Id.* at ¶9.

²⁴¹ *Id.* at ¶10.

²⁴² *Id.* at ¶11.

²⁴³ *Id.* at ¶12.

²⁴⁴ *Id.* at ¶13.

²⁴⁵ *Id.* at ¶14.

ComEd has to balance multiple Third Party Attachers requesting approval to attach to our infrastructure, some involving required attachments by law enforcement that may take a higher priority due to their impact from public safety standpoint. ComEd works with all Third Party Attachers to prioritize their work. For example, between December 2018 and June 2019 Crown Castle reprioritized approximately 146 applications which included moving newer applications in front of aged ones.²⁴⁶

In 2018, ComEd utilized [REDACTED] full time equivalent employees for back office third party attachment support. In early 2019, it progressed to [REDACTED] full time equivalent employees, and is now at [REDACTED] full time equivalent employees for July. With increased resources and favorable weather for make ready work, May-June completions were 300% higher for crown castle than the first four months of 2019. Additionally, ComEd proactively reached out to multiple contractors to solicit additional resources and offered overtime for its internal workforce as well as the contractors.²⁴⁷

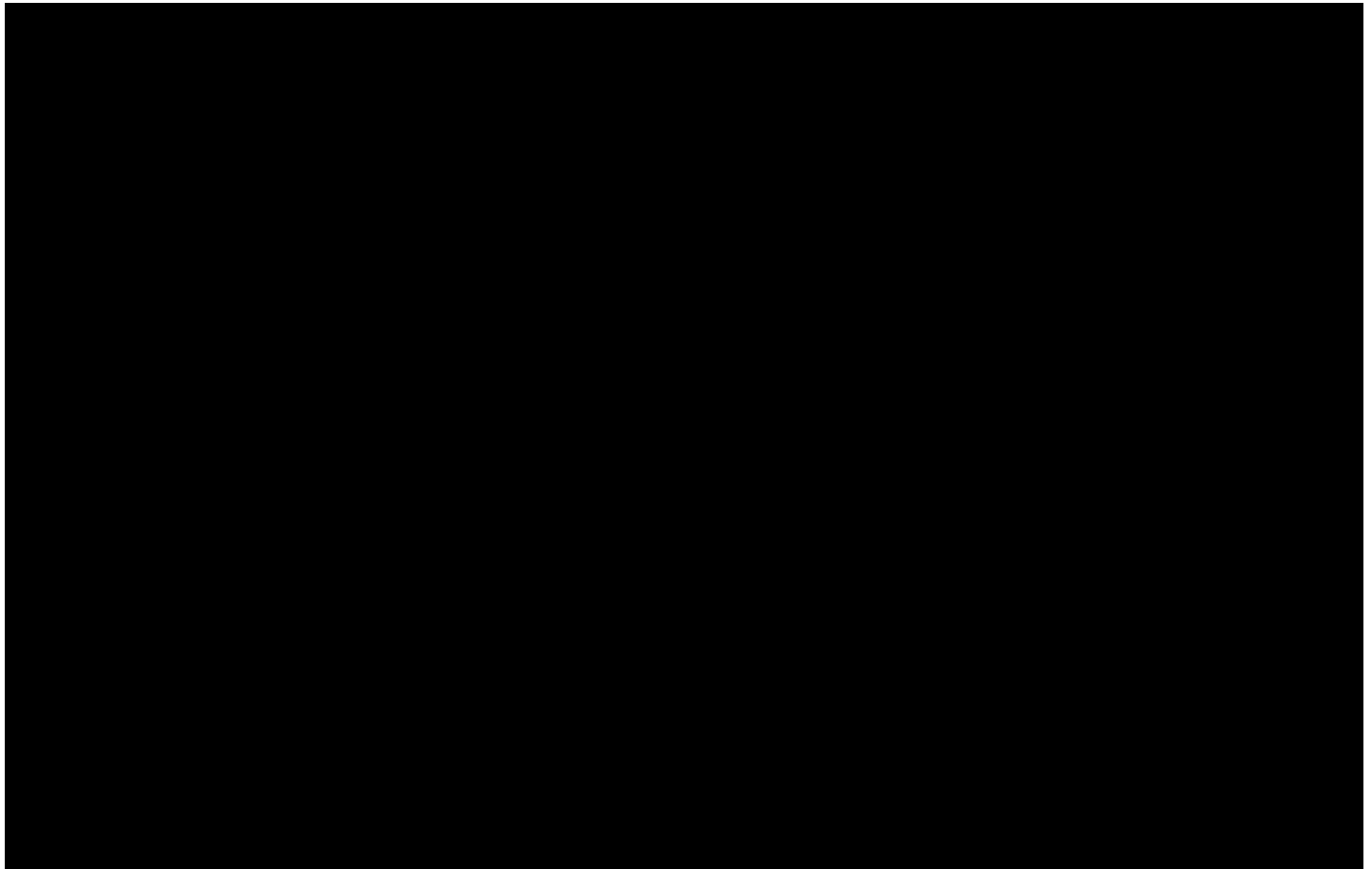
Crown Castle 76: *In 2017 and 2018, Crown Castle provided ComEd with forecasts to give ComEd advanced notice of the volume of fiber and wireless attachment applications that Crown Castle intended to submit in 2018 and 2019.*

ComEd Answer: ComEd admits that Crown Castle provided forecasts, but these forecasts were inaccurate and unreliable, and therefore could not be used by ComEd from planning perspective.

The following chart compares Crown Castle's forecasts of future activity to its actual activity:

²⁴⁶ *Id.* at ¶15.

²⁴⁷ *Id.* at ¶16.



As shown in this chart, for the first five months of the year Crown Castle's actual number of applications was below their planned number of applications by 40%. By September Crown Castle got back on track, and by the end of the year they were 30% over their estimate. It is very difficult to plan for both back office and line resources with such large variability from Crown Castle's projections. Moreover, providing ComEd with the number of projected applications proves to be little value as an application can be for one pole or many poles and the associated make-ready can be minimal or extensive. Thus, while Crown Castle is correct that they provided ComEd with a schedule of applications (which was way off), Crown did not provide ComEd with meaningful information.²⁴⁸

Crown Castle 77: *Despite this ample notice, since 2017, ComEd has not processed all of Crown Castle's applications within the timelines prescribed by the Commission, as required.*

ComEd Answer: ComEd denies that Crown Castle provide ample notice. Crown Castle's forecasts of future activity were inaccurate and unreliable, and therefore could not be used by ComEd from planning perspective. As shown in the chart above, for the first five months of the year Crown Castle's actual number of applications was below their planned number of applications by 40%. By September Crown Castle got back on track, and by the end of the year they were 30% over their estimate. It is very difficult to plan for either back office and line resources with such large variability from Crown Castle's projections. Moreover, providing ComEd with the number of projected

²⁴⁸ Herrera Declaration at ¶16 and Ex. 1.

applications proves to be little value as an application can be for one pole or many poles and the associated make-ready can be minimal or extensive. Thus, while Crown Castle is correct that they provided ComEd with a schedule of applications (which was way off), Crown did not provide ComEd with meaningful information.²⁴⁹

For the reasons explained in ComEd's Affirmative Defenses, ComEd denies that FCC make-ready deadlines and other rules have applied to Crown Castle's attachments to ComEd's poles in Illinois. The July 15 Bureau Order ruled that the FCC had jurisdiction over this Complaint, which has now caused ComEd to reexamine the applicability of FCC make-ready deadlines and other rules. Prior to that time, ComEd (and indeed Crown Castle) operated consistent with ICC jurisdiction, recognizing the ICC had jurisdiction.

Crown Castle 78: *In an attempt to remedy these delays, Crown Castle has met with ComEd on at least 29 separate occasions since 2017.*

ComEd Answer: ComEd does not know what the 29 meetings are Crown Castle referred to in Paragraph 78. ComEd denies the allegations that all of these meetings were an attempt to remedy delays. ComEd conducts weekly meetings to discuss operational issues and prioritize attachments, similar to ComEd's meetings with other attachers. At these weekly meetings, Crown Castle took the opportunity to reprioritize more recent applications over older applications, consistent with ComEd's continuing efforts to collaborate with Crown Castle. The reprioritization requested by Crown Castle had the effect of delaying ComEd's completion of other pending aged applications.²⁵⁰

Crown Castle 79: *For example, Crown Castle proposed a "turnkey" solution, which would allow Crown Castle to control and direct ComEd-approved third party contractors in completing pre-construction surveys and completing make-ready estimates. ComEd rejected this proposal, explaining that it would not allow Crown Castle to exercise control over the third-party contractors.*

ComEd Answer: ComEd denies the allegations in this paragraph because they are based on inadmissible hearsay evidence.

Crown Castle 80: *In addition, to address ComEd's purported shortage of resources, on May 28 2019, Crown Castle requested ComEd to approve Thayer Power & Communication as an authorized contractor to perform complex and above the communications space make-ready and simple make-ready.*

ComEd Answer: ComEd admits the allegations in Paragraph 80 of the Complaint.

Crown Castle 81: *ComEd has not granted or denied the request to approve Thayer Power & Communication as an authorized contractor.*

²⁴⁹ *Id.* at ¶16 and Ex. 1.

²⁵⁰ *Id.* at ¶17.

ComEd Answer: ComEd has not approved Thayer as a contractor because ComEd has a process to qualify contractors and Thayer has not gone through that process. Thayer is not a contractor of choice and despite Crown Castle's representation that Thayer was an approved vendor, ComEd's records reflect no such arrangement.

By letter dated May 30, 2019, ComEd asked Crown Castle for proof that Thayer was an approved contractor, but Crown Castle never responded.²⁵¹ ComEd also explained that FCC regulations do not apply, contrary to Crown Castle's contention.²⁵²

Crown Castle 82: *The following data related to the application processing delays was prepared as of April 30, 2019.*⁷

ComEd Answer: ComEd denies the allegations for lack of knowledge or information sufficient to form a belief as to their truth.

a) Fiber Applications

As explained in ComEd's answers to Paragraphs 83-90 below, much of Crown Castle's application processing timing data is incorrect and/or disregards relevant factors, including actions by Crown Castle itself. For example, some of these timing delays are caused by the reprioritizations requested by Crown Castle, and others are caused by Crown Castle's request to have these applications reviewed for potential reinforcement pursuant to the pilot program.

Crown Castle 83: *Since May 2018, Crown Castle has submitted 836 fiber applications (covering 9,159 poles) that are still pending without final action by ComEd as of April 30, 2019.*

ComEd Answer: ComEd denies the allegations in this paragraph. Since May 2018, Crown Castle has submitted 748 fiber applications (covering 8,075 poles) that are still pending without a permit being issued by ComEd as of April 30, 2019.²⁵³

Crown Castle 84: *ComEd has not completed pre-construction surveys for 41 of the pending fiber applications (covering 342 poles) within 60 days from the application submission dates.*

ComEd Answer: ComEd denies the allegations in Paragraph 84. Out of the 41 pending fiber applications listed in Attachment D, Exhibit 12 of Crown Castle's Complaint, eight applications were submitted to ComEd less than 60 days ago; eight applications were

²⁵¹ Letter from Mark A. Falcone, Vice President of Support Services, Commonwealth Edison Company, to Maureen A. Whitfield, Manager of Utility Relations, Crown Castle Fiber LLC (May 30, 2019), attached hereto at Attachment L (hereinafter "May 30 Falcone Letter").

²⁵² May 30 Falcone Letter; *see also* Letter from Bradley R. Perkins, Assistant General Counsel – Regulatory, Commonwealth Edison Company, to Maureen A. Whitfield, Manager of Utility Relations, Crown Castle Fiber LLC (June 12, 2019), attached to Crown Castle Pole Attachment Complaint at Attachment D, Exhibit 15 (CCF000304-CCF000305).

²⁵³ Herrera Declaration at ¶18.

cancelled by Crown Castle; eight applications require payment from Crown Castle; one is on hold pending updated information from Crown Castle; one application was submitted to ComEd on May 7, 2019, which is outside the May 1, 2017 – April 30, 2019 timeframe; and two applications are not even in ComEd’s records as valid attachment applications. More than 60 days elapsed between the date of submission and April 30, 2019 for only 13 attachment applications.²⁵⁴

Crown Castle 85: *Some of these surveys are overdue by as many as 262 days.*

ComEd Answer: ComEd denies the allegations in Paragraph 85. None of the surveys are overdue by 262 days or anywhere close to that length of time. Moreover, only two of the attachment applications listed in Attachment D, Exhibit 12 of Crown Castle’s Complaint are listed at being over 262 days from submission to ComEd. Out of these two attachment applications, ComEd has not received a survey payment from Crown Castle for one of the applications, and for the other application, ComEd performed the survey well under 262 days.²⁵⁵

Crown Castle 86: *ComEd has not issued make-ready estimates for 446 of the pending fiber applications (covering 5, 271 poles) within 74 days.*

ComEd Answer: ComEd denies the allegations in Paragraph 86. Out of the 446 attachment applications listed in Attachment D, Exhibit 12 of Crown Castle’s Complaint, six applications have been cancelled by Crown Castle; three are on hold pending updated information from Crown Castle; 37 applications did not require make-ready and therefore no make-ready estimate was necessary; one application was submitted to ComEd on May 7, 2019, which is outside the May 1, 2017 – April 30, 2019 timeframe; and 12 applications were submitted to ComEd 74 days or less from April 30, 2019. More than 74 days elapsed between the date of submission and April 30, 2019 for only 387 attachment applications.²⁵⁶

Crown Castle 87: *Crown Castle has been waiting for most of these estimates for at least 78 days and, in some cases, almost a year (355 days).*

ComEd Answer: ComEd denies in part and admits in part the allegations in Paragraph 87. Some of these delays are caused by the reprioritizations requested by Crown Castle, and others are caused by Crown Castle’s request to have these applications reviewed for potential reinforcement pursuant to the pilot program. Although ComEd has not submitted most of these estimates within 78 days from the completion of the survey, there is only one that ComEd has not submitted for almost a year since the survey. For that one, the submission date for ComEd Fiber Application Number 18-0899-CN is listed in Attachment D, Exhibit 12 of Crown Castle’s Complaint as May 10, 2018 (355 days elapsed from submission to April 30, 2019). This statement is incorrect. ComEd Fiber Application Number 18-0899-CN was submitted on May 10, 2018, which is 345 days

²⁵⁴ *Id.* at ¶19.

²⁵⁵ *Id.* at ¶20.

²⁵⁶ *Id.* at ¶21.

prior to April 30, 2019. The poles associated with Application Number 18-0899-CN are part of the second Osmose pilot program, which seeks to determine whether the poles can be reinforced as an alternative to being replaced. The pilot program is the reason 345 days elapsed from the date of submission.²⁵⁷

Crown Castle 88: *Ultimately, ComEd has failed to take final action on 579 of the 836 pending fiber applications (covering 6,701 poles) within the 193 days required under even the longest scenario in the Commission's Rules.*

ComEd Answer: ComEd denies the allegations in Paragraph 88. Out of the 446 attachment applications listed in Attachment D, Exhibit 12 of Crown Castle's Complaint, three applications have been cancelled by Crown Castle; two applications are on hold pending updated information from Crown Castle; 59 applications require payment from Crown Castle; and less than 193 days elapsed between the date of submission and April 30, 2019 for 33 applications. More than 193 days elapsed between the date of submission and April 30, 2019 for only 482 applications.²⁵⁸

Crown Castle 89: *Despite Crown Castle's diligent attempts to cooperate and communicate with ComEd, ComEd has not promptly rectified these delays.*

ComEd Answer: For the reasons explained in ComEd's Affirmative Defenses, ComEd denies that FCC make-ready deadlines and other rules have applied to Crown Castle's attachments to ComEd's poles in Illinois. The July 15 Bureau Order ruled that the FCC had jurisdiction over this Complaint, which has now caused ComEd to reexamine the applicability of FCC make-ready deadlines and other rules. Prior to that time, ComEd (and indeed Crown Castle) operated consistent with ICC jurisdiction, recognizing the ICC had jurisdiction.

ComEd believes it has timely processed Crown Castle's application for pole attachments given ComEd's considerable constraints.²⁵⁹ In 2018, ComEd utilized ■ full time equivalent employees for back office third party attachment support. In early 2019, it progressed to ■ full time equivalent employees, and is now at ■ full time equivalent employees for July. With increased resources and favorable weather for make ready work, May-June completions were 300% higher for Crown Castle than the first four months of 2019. Additionally, ComEd proactively reached out to multiple contractors to solicit additional resources and offered overtime for its internal workforce as well as the contractors.²⁶⁰

Crown Castle 90: *ComEd will not permit Crown Castle to hire or control approved contractors to perform the survey or make ready work.*

ComEd Answer: ComEd denies the allegations in this paragraph because they are based

²⁵⁷ *Id.* at ¶22.

²⁵⁸ *Id.* at ¶23.

²⁵⁹ Mann Declaration at ¶8.

²⁶⁰ *Id.* at ¶16.

on inadmissible hearsay evidence.

Crown Castle requested that ComEd approve Thayer Power & Communication to conduct self-help complex and above the communications space make-ready and simple make-ready.²⁶¹ By letter dated May 30, 2019, ComEd asked Crown Castle for proof that Thayer was an approved contractor, but Crown Castle never responded.²⁶² ComEd also asked Crown Castle for proof that Thayer met the five criteria Crown Castle cited, but Crown Castle never responded to that request either.²⁶³ ComEd also explained that FCC regulations do not apply, contrary to Crown Castle's contention.²⁶⁴

For the reasons explained in ComEd's Affirmative Defenses, ComEd denies that FCC make-ready deadlines and other rules have applied to Crown Castle's attachments to ComEd's poles in Illinois. The July 15 Bureau Order ruled that the FCC had jurisdiction over this Complaint, which has now caused ComEd to reexamine the applicability of FCC make-ready deadlines and other rules. Prior to that time, ComEd (and indeed Crown Castle) operated consistent with ICC jurisdiction, recognizing the ICC had jurisdiction.

b) Wireless Applications

As explained in ComEd's answers to Paragraphs 91-99 below, much of Crown Castle's application processing timing data is incorrect and/or disregards relevant factors, including actions by Crown Castle itself. ComEd believes it has timely processed Crown Castle's application for pole attachments given ComEd's considerable constraints.

Crown Castle 91: *Crown Castle has also submitted many applications for wireless attachments over the past year, and, like the fiber applications, ComEd has failed to process these wireless applications in accordance with the FCC's Rules.*

ComEd Answer: ComEd admits that Crown Castle has submitted many applications for wireless attachments over the past year, but denies that ComEd was required to process those applications in accordance with FCC rules.

Crown Castle 92: *Since March 2018, Crown Castle has submitted 854 wireless applications that are still pending as of April 30, 2019.*

²⁶¹ Letter from Maureen A. Whitfield, Manager of Utility Relations, Crown Castle Fiber LLC, to Mark A. Falcone, Vice President of Support Services, Commonwealth Edison Company (May 28, 2019), attached to Crown Castle Pole Attachment Complaint at Attachment D, Exhibit 14 (CCF000301-CCF000302).

²⁶² May 30 Falcone Letter.

²⁶³ *Id.*

²⁶⁴ May 30 Falcone Letter; *see also* Letter from Bradley R. Perkins, Assistant General Counsel – Regulatory, Commonwealth Edison Company, to Maureen A. Whitfield, Manager of Utility Relations, Crown Castle Fiber LLC (June 12, 2019), attached to Crown Castle Pole Attachment Complaint at Attachment D, Exhibit 15 (CCF000304-CCF000305).

ComEd Answer: ComEd denies the allegations in Paragraph 92. Since March of 2018 Crown Castle has submitted 783 wireless applications that were still pending as of April 30, 2019. Some of these delays are caused by the reprioritizations requested by Crown Castle, and others are caused by Crown Castle's request to have these applications reviewed for potential reinforcement pursuant to the pilot program.²⁶⁵

Crown Castle 93: *Despite constant follow-up from Crown Castle, ComEd has not completed pre-construction surveys for 114 pending wireless attachment applications within 60 days from the application submission date.*

ComEd Answer: ComEd denies that Crown Castle performed "constant follow-up" and denies the allegations in Paragraph 93. Out of the 114 wireless applications listed in Attachment D, Exhibit 12 of Crown Castle's Complaint, 13 applications were cancelled by Crown Castle; 21 applications are on hold pending updated information from Crown Castle; five applications are for modifications of existing Third Party Attachments and do not require an additional walk; four applications have no Third Party Attachment number and can't be identified; one application is listed twice (18-3827-CN); and two applications were submitted to ComEd after April 30, 2019. Pre-construction surveys have not been completed for only 37 attachment applications within 60 days of submission.²⁶⁶

Crown Castle 94: *Crown Castle has been waiting well over 74 days for make-ready estimates for 378 wireless attachment applications.*

ComEd Answer: ComEd denies the allegations in Paragraph 94. Out of the 378 attachment applications listed in Attachment D, Exhibit 12 of Crown Castle's Complaint, 14 applications did not require make-ready and therefore no make-ready estimate was necessary; 11 applications were cancelled by Crown Castle; 14 applications are on hold pending updated information from Crown Castle; one was a modification of another attachment application for which the make-ready estimate was already provided to Crown Castle; and 74 days or less elapsed between the date of submission and April 30, 2019 for 16 of the applications. More than 74 days elapsed between the date of submission and April 30, 2019 for only 322 applications.²⁶⁷

Crown Castle 95: *In the case of nine (9) wireless attachment applications, Crown Castle has been awaiting make-ready estimates for over a year.*

ComEd Answer: ComEd denies the allegations in Paragraph 95. Out of the nine wireless attachment applications listed in Attachment D, Exhibit 12 of Crown Castle's Complaint, four were rejected by ComEd, and less than 365 days has elapsed between the date of submission and April 30, 2019 for four applications. More than 365 days elapsed between the date of submission and April 30, 2019 for only one wireless attachment

²⁶⁵ Herrera Declaration at ¶24.

²⁶⁶ *Id.* at ¶25.

²⁶⁷ *Id.* at ¶26.

application that requires a make-ready estimate.²⁶⁸

Crown Castle 96: *Ultimately, ComEd has failed to take final action on 254 of the wireless attachment applications within the 223 days set forth in the Commission's Rules.*

ComEd Answer: ComEd denies the allegations in Paragraph 96. Out of the 254 wireless attachment applications listed in Attachment D, Exhibit 12 of Crown Castle's Complaint, six applications have been cancelled by Crown Castle; 39 applications require payment from Crown Castle; two are completed modifications and did not need a permit; and less than 223 days elapsed between the date of submission and April 30, 2019 for 41 of the applications. Of those 41 applications, permits were issued by ComEd for 24 applications in less than 223 days. More than 223 days elapsed between the date of submission and April 30, 2019 for only 156 wireless attachment applications.²⁶⁹

Crown Castle 97: *At least 124 of the wireless attachment applications have been pending over 9 months.*

ComEd Answer: ComEd denies the allegations in Paragraph 97. Out of the 124 wireless attachment applications listed in Attachment D, Exhibit 12 of Crown Castle's Complaint, more than 273 days (nine months) elapsed between the date of submission and April 30, 2019 for only 71 wireless attachment applications.²⁷⁰

Crown Castle 98: *Seventeen (17) of the wireless attachment applications have been pending over 12 months.*

ComEd Answer: ComEd denies the allegations in Paragraph 98. Out of the 17 wireless attachment applications listed in Attachment D, Exhibit 12 of Crown Castle's Complaint, permits were issued by ComEd for five applications in less than 365 days; one requires payment from Crown Castle; four are on hold pending updated information from Crown Castle; and one has been cancelled by Crown Castle. More than 365 days elapsed between the date of submission and April 30, 2019 for only six wireless attachment applications.²⁷¹

Crown Castle 99: *Despite Crown Castle's diligent follow-up, including meetings, phone calls, and e-mail correspondence, ComEd has not corrected these delays.*

ComEd Answer: ComEd denies the allegation that characterizes Crown Castle's follow-up as diligent, and that characterizes ComEd's processing of applications as delays.

ComEd believes it has timely processed Crown Castle's application for pole attachments

²⁶⁸ *Id.* at ¶27.

²⁶⁹ *Id.* at ¶28.

²⁷⁰ *Id.* at ¶29.

²⁷¹ *Id.* at ¶30.

given ComEd's considerable constraints.²⁷²

ComEd is one of the largest electric utility companies in the nation, responsible for delivering safe and reliable power to 3.8 million homes and businesses across northern Illinois. The company manages a network of 90,000 miles of power lines, 1.3 million poles and 1,300 substations that make up the electrical infrastructure of the nation's third largest metropolitan region. As part of its core business, ComEd is a member of three mutual assistance groups coordinated through the Edison Electrical Institute (EEI).²⁷³

Third Party Attachments are a workstream that touches multiple departments and is not utility core work. Third Party Attachments are typically telecommunications companies that want to utilize utilities' existing infrastructure as a conduit to get to market with various communication technologies. With 5G technology there is competition that is creating large and volatile volume changes. Each application can request between 1 and 99 pole attachment locations with associated make ready work.²⁷⁴

In 2012, ComEd received approximately 48 Third Party Attachment applications across the service territory compared to more than 4500 in 2018. The make ready work is now approximately 2000 pole replacements and approximately 27,000 pole attachments per year. In 2017 and 2018, the telecommunications companies were very guarded with their workplan projections, and with the volume spikes, ComEd manually polled many attachers to get directional forecasts on volumes. Originally, Crown Castle stated a 12-18 month build out and then in the fourth quarter of 2018 they stated that this was a multi-year (5+ years) sustainable effort.²⁷⁵

With the increase in Third Party Attachment volumes, ComEd created a flexible and scalable structure dedicated for the design portion of Third Party Attachments keeping the design function ahead of construction.²⁷⁶

In 2018, as part of ComEd's Edison Electric Institute commitment, ComEd sent crews for hurricane rebuilding efforts in Puerto Rico and Florida. In late 2018, ComEd applied additional resources to recover on make ready work however, ComEd experienced its own storm in late November. In early November of 2018 California started to rebuild its infrastructure due to a large fire and over the next few months started to pull nationally for qualified workers.²⁷⁷

In 2019, California drew additional workers nationally by offering approximately 32 hours of overtime per week plus a generous per diem. Simultaneously, ComEd was challenged with supporting internal storms and mutual assistance mixed with extreme cold weather through early February of 2019, as part of our core work, and caused a slow down on make ready work. With a tight labor market, ComEd secured additional

²⁷² Mann Declaration at ¶8.

²⁷³ *Id.* at ¶9.

²⁷⁴ *Id.* at ¶10.

²⁷⁵ *Id.* at ¶11.

²⁷⁶ *Id.* at ¶12.

²⁷⁷ *Id.* at ¶13.

contracting crews and even allocated internal and external overtime while being impacted by what was in addition an abnormally wet spring. For the first quarter of 2019, ComEd has experienced six internal storm recovery activations and approximately 80 days of inclement weather.²⁷⁸

ComEd has to balance multiple Third Party Attachers requesting approval to attach to our infrastructure, some involving required attachments by law enforcement that may take a higher priority due to their impact from public safety standpoint. ComEd works with all Third Party Attachers to prioritize their work. For example, between December 2018 and June 2019 Crown Castle reprioritized approximately 146 applications which included moving newer applications in front of aged ones.²⁷⁹

In 2018, ComEd utilized ■ full time equivalent employees for back office third party attachment support. In early 2019, it progressed to ■ full time equivalent employees, and is now at ■ full time equivalent employees for July. With increased resources and favorable weather for make ready work, May-June completions were 300% higher for crown castle than the first four months of 2019. Additionally, ComEd proactively reached out to multiple contractors to solicit additional resources and offered overtime for its internal workforce as well as the contractors.²⁸⁰

E. DISCUSSION

1. Crown Castle's Requests to Attach to "Red Tag" Poles

As explained in ComEd's answers to Paragraphs 100-120 below, the "red tagged" poles that Crown Castle references in this proceeding do not qualify as "red tagged" poles as defined by the Commission in the OTMR Order because they do not violate safety standards. As such, the OTMR Order provisions applicable to "red tagged" poles do not apply.

ComEd's processes with respect to red tagged poles is in accordance with the NESC, not a violation of the NESC. The poles at issue in this proceeding are at full capacity based on ComEd's engineering and reliability standards, which ComEd imposes on all attachers including itself in a nondiscriminatory manner. For new attachments to be accommodated, ComEd must expand capacity by installing a replacement pole (or by reinforcing the existing pole, if appropriate). In most cases, therefore, Crown Castle is asking that the Commission require ComEd to expand capacity to accommodate Crown Castle's attachment requests, which the Commission cannot require utilities to do.

The Declaration of Nelson Bingel is based on his analysis of the wrong edition of the NESC, which contains different language than the one in effect in Illinois. Just as bad, he and Crown Castle both incorrectly assume that a red-tagged "Priority" pole as classified by ComEd is one that presents a danger to life or property and so must be fixed "promptly." As a result, the

²⁷⁸ *Id.* at ¶14.

²⁷⁹ *Id.* at ¶15.

²⁸⁰ *Id.* at ¶16.

opinions expressed in his Declaration are misdirected and uninformed, as are the arguments of Crown Castle that rely upon them.

ComEd's practices and procedures ComEd follows with respect to its pole inspection program, including the identification and treatment of "red tagged" poles, complies with the NESC, which requires any condition that could endanger life or property to be promptly repaired, disconnected, or isolated, and which requires all other conditions to be recorded and to maintain such records until the defects are corrected.

Crown Castle is trying to use a nonexistent provision of the NESC in Illinois to convince the Commission that ComEd should perform a pole loading study that Crown Castle believes few in the industry perform in order to allow Crown Castle to attach its facilities to poles that have been red tagged.

The FCC should disregard Mr. Bingel's opinion: Mr. Bingel has never been responsible for running a major metropolitan utility. Questions of reasonableness or appropriateness are best left to those who are responsible not only for poles but for the remainder of the utility's urban infrastructure including cables, manholes, vaults, wires, and conduits, all of which demand resources to support an evolving grid of the future.

Importantly, the "red tagged" poles that Crown Castle references in this proceeding do not qualify as "red tagged" poles as defined by the Commission because they do not violate safety standards. As a result, the OTMR Order provisions applicable to "red tagged" poles do not apply.

A large part of the reason Crown Castle must replace the overwhelming majority of "red tag" poles rather than reinforce them is because two-thirds of the distribution poles in Chicago are three-phase poles, which carry a lot of electric load and which affect a large number of electric customers, and most of Crown Castle's attachments are in Chicago and similarly population dense areas.

Crown Castle 100: *ComEd's refusal to allow Crown Castle to attach to ComEd poles that have been "red tagged" is an effective denial of access to ComEd's poles in violation of Section 224.*

ComEd Answer: ComEd denies that ComEd has refused to allow Crown Castle to attached to ComEd poles that have been "red tagged." Paragraph 100 of the Complaint contains legal conclusions to which no response is required. To the extent a response is required, the allegations of Paragraph 100 are denied.

Crown Castle 101: *Section 224(f) of the Communications Act requires a utility to provide telecommunications carrier with "non-discriminatory access to any pole . . . owned or controlled by it."*

ComEd Answer: Paragraph 101 of the Complaint contains legal conclusions to which no response is required. To the extent a response is required, the allegations of Paragraph

101 are denied.

Crown Castle 102: *Under the Commission’s Rules, if a utility denies access to a specific pole, it is required to confirm the denial in writing. “The utility’s denial of access shall be specific, shall include all relevant evidence and information supporting its denial, and shall explain how such evidence and information relate to a denial of access for reasons of lack of capacity, safety, reliability or engineering standards.”*

ComEd Answer: Paragraph 102 of the Complaint contains legal conclusions to which no response is required. To the extent a response is required, the allegations of Paragraph 102 are denied.

Crown Castle 103: *In its August 3, 2018 Third Report and Order and Declaratory Ruling, the Commission confirmed that utilities cannot deny access to poles based on the pole being “red tagged.” The Commission clarified that utilities may not deny attaching parties access to a pole based on safety concerns arising from a pre-existing condition, and specifically not where the pole was red tagged. Indeed, the Commission explicitly stated that “[t]his includes situations where a pole has been red-tagged, and new attachers are prevented from accessing a pole until it is replaced.” Moreover, the Commission explained that “[s]imply denying new attachers access prevents broadband deployment and does nothing to correct the safety issue,” and “[f]or this reason, we reject Xcel Energy and Alliant Energy’s suggestion that we provide utilities, where there is a preexisting violation, ‘the right to stop all work on that pole and prohibit physical access to that pole until the preexisting safety issue is resolved and the pole is brought into compliance.’”*

ComEd Answer: The “red tagged” poles that Crown Castle references in this proceeding do not qualify as “red tagged” poles as defined by the Commission in footnote 450 of the OTMR Order. The OTMR Order defines a “red tagged” pole as one that is “found to be non-compliant with safety standards.”²⁸¹ But the poles at issue in this proceeding do not violate safety standards as Crown Castle would like the Commission to believe.

Instead, as explained above, in the regular course of business, ComEd performs regular pole inspections. Any pole which upon inspection is found to present a danger to life or property is promptly repaired, disconnected or isolated, in accordance with NESC Rule 214.A.5 in effect in Illinois. Any other pole which upon inspection is found to have deteriorated below original strength by more than 33% is “red tagged” and deemed a “reject pole,” consistent with Table 261-1A of the 2002 NESC in effect in Illinois.²⁸² Poles exhibiting this deterioration or any other defect in the course of inspection are recorded, and such records of defects are maintained until the defects are corrected, in accordance with NESC Rule 214.A.4 in effect in Illinois. This activity is in accordance with the NESC, not a violation of the NESC.²⁸³

²⁸¹ OTMR Order at n.450.

²⁸² 2002 NATIONAL ELECTRICAL SAFETY CODE, Table 261-1A (2001).

²⁸³ See Arns Declaration at ¶¶4-5.

The Complaint does not demonstrate any NESC violations. Crown cites the 2017 edition of the NESC at Rules 214.A.5.a. and b. which (as explained above) are not in effect in Illinois, but nevertheless ComEd's practices do not violate these provisions anyway. And, as explained above, ComEd's practices also do not violate the 2002 Code Section that actually is in effect in Illinois, but which was not even addressed by the Complaint. ComEd has not failed to replace or reinforce these poles in a timely manner, and so the NESC has not been violated.²⁸⁴

Because the poles in this proceeding do not have preexisting safety violations, they are not the same "red tagged" poles defined in the OTMR Order. As a result, the OTMR Order provisions applicable to "red tagged" poles do not apply.

The poles at issue in this proceeding are at full capacity based on ComEd's engineering and reliability standards, which ComEd imposes on all attachers including itself in a nondiscriminatory manner. For new attachments to be accommodated, ComEd must expand capacity by installing a replacement pole (or by reinforcing the existing pole, if appropriate). In most cases, therefore, Crown Castle is asking that the Commission require ComEd to expand capacity to accommodate Crown Castle's attachment requests. It has been long established, however, that the Commission cannot require utilities to expand capacity by installing taller poles.

The Pole Attachment Act allows utilities to deny access for lack of capacity:

Notwithstanding paragraph (1), a utility providing electric service may deny a cable television system or any telecommunications carrier access to its poles, ducts, conduits, or rights-of-way, on a non-discriminatory basis where there is insufficient capacity and for reasons of safety, reliability and generally applicable engineering purposes.²⁸⁵

Accordingly, electric utilities need not expand capacity to accommodate attaching entities.²⁸⁶ The Commission agrees. As explained in the April 2011 Pole Attachment Order: "[A]s the court noted in *Southern Company*, mandating the construction of new capacity is beyond the Commission's authority."²⁸⁷

²⁸⁴ See *id.* at ¶¶4-5.

²⁸⁵ 47 U.S.C. §224(f)(2) (2010).

²⁸⁶ This determination has been upheld by the 11th Circuit. In *Southern Company v. FCC*, utility petitioners objected to the Commission's 1999 decision that "utilities must expand pole capacity to accommodate requests for attachment in situations where it is agreed that there is insufficient capacity on a given pole to permit third-party pole attachments." *Southern Co. v. FCC*, 292 F.3d 1338, 1347 (11th Cir. 2002), quoting *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499 (1996), *aff'd*, Order on Reconsideration, 14 FCC Rcd 18049 (1999). The 11th Circuit held that the plain language of Section 224(f)(2) explicitly prevents the Commission from mandating pole replacements: "When it is agreed that capacity is insufficient, there is no obligation to provide third parties with access to that particular 'pole, duct, conduit, or right-of-way.'" *Southern Co. v. FCC.*, 292 F.3d 1338, 1347 (11th Cir. 2002). The court further noted that "the FCC's attempt to mandate capacity expansion is outside of its purview under the plain language of the statute." *Id.*

²⁸⁷ *April 2011 Pole Attachment Order* at ¶ 95.

The poles at issue in this proceeding that have been “red tagged” for later replacement are poles that the NESC does not require to be replaced right away, as they do not endanger life or property, and have been treated to maintain and extend their present reliable state of service. As such, Crown Castle’s request for a ruling that they be replaced immediately is a rule requiring utilities to expand capacity, which the Pole Attachment Act prohibits. Consistent with the Pole Attachment Act, Crown Castle’s request for capacity expansion should be denied.

Crown Castle 104: *As discussed above, ComEd has refused to fully articulate and explain its basis for identifying a pole as “red tagged” and for determining why that pole must be replaced or reinforced. As to each pole to which ComEd has denied access on the general basis of “red tag” status, ComEd has not provided specific information identifying all relevant evidence and information supporting its denial or explaining how the evidence supports denial based on lack of capacity, safety, reliability or engineering standards.*

ComEd Answer: ComEd cannot recall whether Crown Castle has requested such information or whether ComEd has orally provided at least a general description of the criteria used for designating poles as priority/non-priority or restorable/replacement. A detailed, accurate description of ComEd’s program can be quite complicated with lots of variants and different inspection methods, and depends on information such as wood species, original treatment type, setting medium, accessibility, presence of other underground facilities, pole height, electric capacity, effective circumference, pole defects (e.g., splits, woodpecker holes, cracks), service attachments, the impact on electric distribution customers, and other factors. It should also be noted that ComEd’s pole inspections are currently outsourced to Osmose Utility Services, Inc., using Osmose load calculation software and using Osmose pole treatment services. This is the company with which Crown Castle’s expert Mr. Bingel was employed for 30 years.

ComEd’s specification for pole maintenance services is shared with its pole co-owners, sister companies, and its service provider. Beyond that, these are treated as internal proprietary documents.²⁸⁸

Crown Castle 105: *As the Commission clarified in the OTMR Order, the mere fact that a pole has been red tagged by ComEd does not satisfy Section 224(f) or the Commission’s Rules. Maintaining the structural safety and integrity of its poles is ComEd’s responsibility. If a pole has red tag status, it means that ComEd needs to replace or in some cases reinforce that pole, and it needs to do so in a timely manner. Specifically, Under NESC Rule 214.A.5, lines and equipment with “recorded conditions or defects that would reasonably be expected to endanger human life or property shall be promptly corrected, disconnected or isolated” and “[o]ther conditions or defects shall be designated for correction.”*

ComEd Answer: ComEd admits that Rule 214 of the 2017 edition of the NESC contains this language, but ComEd denies that Rule 214 of the 2002 edition of the NESC that is in effect in Illinois contains this language.

²⁸⁸ D’Hooge Declaration at ¶7.

In the 2017 edition of the NESC, NESC Rule 214.A.5. states:

214. Inspection and tests of lines and equipment

....

5. Corrections

- a. Lines and equipment with recorded conditions or defects that would reasonably be expected to endanger human life or property shall be promptly corrected, disconnected, or isolated.
- b. Other conditions or defects shall be designated for correction.²⁸⁹

Crown Castle is apparently unaware that the version of the NESC adopted in Illinois does not contain Rules 214.A.5.a or 214.A.5.b.²⁹⁰ The version of the NESC adopted in Illinois is the 2002 version of the Code.²⁹¹ Instead, the relevant rule for this analysis are Rules 214.A.4 and .5, which in the 2002 NESC adopted by Illinois reads:

214. Inspection and Tests of Lines and Equipment

....

4. Record of Defects

Any defects affecting compliance with this code revealed by inspection or tests, if not promptly corrected, shall be recorded; such records shall be maintained until the defect is corrected.

5. Remedying Defects

Lines and equipment with recorded defects that could reasonably be expected to endanger life or property shall be promptly repaired, disconnected, or isolated.²⁹²

Since Crown Castle's argument relies on the assumption that Rule 214.A.5.a and 214.A.5.b of the 2017 NESC has been adopted in Illinois, and since Crown Castle makes no mention at all of the relevant Rules 214.A.4 and .5 in Illinois, much less provides any analysis of it, Crown Castle's allegations in paragraphs 117-120 are misdirected and uninformed.²⁹³

Equally misdirected and uninformed are Crown Castle's and Mr. Bingel's assumptions

²⁸⁹ 2017 NATIONAL ELECTRICAL SAFETY CODE, Rule 214.A.5.a-b. (Apr. 26, 2016), attached hereto at Attachment M.

²⁹⁰ D'Hooe Declaration at ¶23.

²⁹¹ ILL. ADMIN. CODE tit. 83, § 305.20 (2003).

²⁹² 2002 NATIONAL ELECTRICAL SAFETY CODE, Rule 214.A.4-.5 (2001).

²⁹³ D'Hooe Declaration at ¶24.

that the poles ComEd designates as “Priority” poles are poles that endanger life or property. Such poles must “promptly” be “repaired, disconnected, or isolated,” if one properly cites the 2002 NESC in effect in Illinois, or must “promptly” be “corrected, disconnected, or isolated” if one incorrectly cites the 2017 edition of the NESC, as does Mr. Bingel. Contrary to the incorrect assumption of Crown Castle and Mr. Bingel, however, ComEd’s “Priority” red-tagged poles are not such poles that must “promptly” be “repaired, disconnected, or isolated.”

Instead, in the regular course of business, ComEd performs regular pole inspections. Any pole which upon inspection is found to present a danger to life or property is promptly repaired, disconnected or isolated, in accordance with NESC Rule 214.A.5 in effect in Illinois. Any other pole which upon inspection is found to have deteriorated below original strength by more than 33% is “red tagged” and deemed a “reject pole,” consistent with Table 261-1A of the 2002 NESC in effect in Illinois.²⁹⁴ Poles exhibiting this deterioration or any other defect in the course of inspection are recorded, and such records of defects are maintained until the defects are corrected, in accordance with NESC Rule 214.A.4 in effect in Illinois.²⁹⁵

At ComEd any poles or other structures which are found to pose an immediate safety hazard are mitigated with immediate resource commitment toward isolation, repair or replacement to remove the hazard. Conditions related to wider infrastructure operation and maintenance are responsibly prioritized, managed and executed.²⁹⁶

Crown Castle 106: *As discussed above, ComEd is not correcting the defects in its pole in a reasonably timely manner. Under standard industry practice, ComEd should be replacing its “Priority” poles within approximately 30, 90, or at most 180 days after inspection depending on the utility company’s standard for pole strength that triggers red tag status. For all other red tagged poles, ComEd should be correcting the issue, either by replacement or reinforcement where possible, within approximately one year after inspection. Yet, ComEd is not replacing or reinforcing its red tagged poles in an even remotely timely fashion. Although Crown Castle cannot confirm that ComEd is actually following its own policy, at most ComEd’s policy is to restore Priority Restorable poles within the current inspection year, and to replace Priority Non-Restorable poles in the next calendar year. Yet, standard industry practice says that ComEd should be replacing those priority poles with a matter of approximately 90 days. For its “Non-Priority” red tagged poles, ComEd’s policy is to restore or replace the pole “after Load Calculation classification within a set timeframe.” Yet, Crown Castle understands that ComEd is not performing such “load calculation” on any Non-Priority poles, and there is no set timeframe for correction of any of the Non-Priority poles. Crown Castle understands that approximately 75% of ComEd’s red tagged poles are “Non-Priority.” As a result, ComEd has hundreds (or more) poles that have been labeled red tag, but which may go uncorrected for many years. Under standard industry practice, ComEd should be repairing (either with replacement or reinforcement where possible) all red tag poles within one year. Allowing red tagged poles to go un-corrected for many years is not reasonable.*

²⁹⁴ 2002 NATIONAL ELECTRICAL SAFETY CODE, Table 261-1A (2001).

²⁹⁵ Arns Declaration at ¶5.

²⁹⁶ D’Hooge Declaration at ¶6.

ComEd Answer: ComEd denies the allegations in this paragraph. Crown Castle is relying for these conclusions on Rule 214 of the 2017 edition of the NESC, but Rule 214 of the 2002 edition of the NESC is the version that is in effect in Illinois.

In the 2017 edition of the NESC, NESC Rule 214.A.5. states:

214. Inspection and tests of lines and equipment

....

5. Corrections

- a. Lines and equipment with recorded conditions or defects that would reasonably be expected to endanger human life or property shall be promptly corrected, disconnected, or isolated.
- b. Other conditions or defects shall be designated for correction.²⁹⁷

Crown Castle is apparently unaware that the version of the NESC adopted in Illinois does not contain Rules 214.A.5.a or 214.A.5.b.²⁹⁸ The version of the NESC adopted in Illinois is the 2002 version of the Code.²⁹⁹ Instead, the relevant rule for this analysis are Rules 214.A.4 and .5, which in the 2002 NESC adopted by Illinois reads:

214. Inspection and Tests of Lines and Equipment

....

4. Record of Defects

Any defects affecting compliance with this code revealed by inspection or tests, if not promptly corrected, shall be recorded; such records shall be maintained until the defect is corrected.

5. Remedying Defects

Lines and equipment with recorded defects that could reasonably be expected to endanger life or property shall be promptly repaired, disconnected, or isolated.³⁰⁰

Since Crown Castle's argument relies on the assumption that Rule 214.A.5.a and 214.A.5.b of the 2017 NESC has been adopted in Illinois, and since Crown Castle makes no mention at all of the relevant Rules 214.A.4 and .5 in Illinois, much less provides any

²⁹⁷ 2017 NATIONAL ELECTRICAL SAFETY CODE, Rule 214.A.5.a-b. (Apr. 26, 2016), attached hereto at Attachment M.

²⁹⁸ D'Hooze Declaration at ¶23.

²⁹⁹ ILL. ADMIN. CODE tit. 83, § 305.20 (2003).

³⁰⁰ 2002 NATIONAL ELECTRICAL SAFETY CODE, Rule 214.A.4-.5 (2001).

analysis of it, Crown Castle's allegations in paragraphs 117-120 are misdirected and uninformed.³⁰¹

Equally misdirected and uninformed are Crown Castle's and Mr. Bingel's assumptions that the poles ComEd designates as "Priority" poles are poles that endanger life or property. Such poles must "promptly" be "repaired, disconnected, or isolated," if one properly cites the 2002 NESC in effect in Illinois, or must "promptly" be "corrected, disconnected, or isolated" if one incorrectly cites the 2017 edition of the NESC, as does Mr. Bingel. Contrary to the incorrect assumption of Crown Castle and Mr. Bingel, however, ComEd's "Priority" red-tagged poles are not such poles that must "promptly" be "repaired, disconnected, or isolated."

Instead, in the regular course of business, ComEd performs regular pole inspections. Any pole which upon inspection is found to present a danger to life or property is promptly repaired, disconnected or isolated, in accordance with NESC Rule 214.A.5 in effect in Illinois. Any other pole which upon inspection is found to have deteriorated below original strength by more than 33% is "red tagged" and deemed a "reject pole," consistent with Table 261-1A of the 2002 NESC in effect in Illinois.³⁰² Poles exhibiting this deterioration or any other defect in the course of inspection are recorded, and such records of defects are maintained until the defects are corrected, in accordance with NESC Rule 214.A.4 in effect in Illinois.³⁰³

At ComEd any poles or other structures which are found to pose an immediate safety hazard are mitigated with immediate resource commitment toward isolation, repair or replacement to remove the hazard. Conditions related to wider infrastructure operation and maintenance are responsibly prioritized, managed and executed.³⁰⁴

Crown Castle and its witness Mr. Bingel misunderstands the facts and have mistakenly relied on the wrong NESC provisions. Their conclusions as to standard industry practice therefore have no merit with respect to ComEd's pole distribution system and practices in the state of Illinois.

Crown Castle 107: *While, upon information and belief, ComEd has developed a database that tracks and contains detailed information about "red tag" poles, ComEd has refused to provide Crown Castle with access to this database.*

ComEd Answer: ComEd has a database containing information about its poles that have been inspected, and Osmose provides the input information for the database. It is possible to query the database to identify which of those poles are red tagged. Crown Castle may have asked for access to this database to easily engineer its fiber routes. ComEd believes it responded by stating the information is confidential, and that Crown Castle must in any event survey the poles before they submit an application. ComEd's

³⁰¹ D'Hooge Declaration at ¶24.

³⁰² 2002 NATIONAL ELECTRICAL SAFETY CODE, Table 261-1A (2001).

³⁰³ Arns Declaration at ¶5.

³⁰⁴ D'Hooge Declaration at ¶6.

system is critical infrastructure and ComEd cannot and does not provide such sensitive information about its pole plant to outside parties like Crown Castle.³⁰⁵

Crown Castle 108: *ComEd’s practice of labeling poles with a red tag, but potentially taking no action to repair or replace those poles for over a year and possibly as long as 10 years raises significant issues and questions. Notably, if ComEd is using standard industry thresholds for defining when a pole is “red tagged,” then its failure to remediate that condition within a year is unreasonable in light of the NESC, standard industry practice, and good and standard engineering practice. Alternatively, if ComEd is using a different standard than the 33 percent threshold stated in its documents (in such a way as to justify ComEd’s failure to replace the pole within a year), then ComEd’s practice raises questions about whether ComEd is inappropriately applying the red tag status to a significant number of poles and then denying access to those poles unless the attaching party pays for a new pole. Indeed, ComEd’s practices suggest that some significant number of its Non-Priority Poles may be able to accommodate attachment by Crown Castle. At a minimum, it is not reasonable for ComEd to apply red tag status to a significant number of poles and have those poles remain in that status for potentially many years, unavailable for additional third party attachment or even any work by existing attachers.*

ComEd Answer: ComEd denies the allegations in this paragraph, which are based on the following several opinions expressed in the Bingel Declaration.

At paragraph 13 of his Declaration, Mr. Bingel states: “Standard industry practice is to restore or replace ‘priority’ poles within time frames such as 30, 90 or 180 days. The varying length of time reflects the fact that utilities may have varying standards for when a red tagged pole becomes ‘priority.’” This statement indicates that there is no industry-wide standard at all, even under inapplicable NESC Rule 214.A.5, and that instead each utility may adopt their own standard.³⁰⁶

Second, Mr. Bingel claims that “Standard industry practice is to restore or replace Non-Priority poles during the next year’s inspection program, although it is not unusual for utility companies to restore Non- Priority poles during the same year as the inspection.”³⁰⁷ But there is no standard industry practice that Mr. Bingel cites to. If there is such an “Industry Standard” then Crown Castle should produce any such published standard, which presumably would be an ANSI-accredited, consensus-based document. Lacking one, what the industry has instead are a variety of Company standards, which will vary according to the particular companies’ particular conditions.³⁰⁸ As a person with extensive experience in the Standards community, Mr. Bingel should be well aware of the thresholds necessary to create an industry standard as opposed to a “typical” or a “common” practice. Both of these can be influenced by perception.³⁰⁹

For both “priority” and “non-priority” poles, there is no “industry standard” that details a

³⁰⁵ Tyschenko Declaration at ¶8.

³⁰⁶ D’Hooge Declaration at ¶8.

³⁰⁷ See Declaration of Nelson Bingel, attached to Crown Castle Pole Attachment Complaint at Attachment E, at ¶25 (CCF000327).

³⁰⁸ D’Hooge Declaration at ¶21.

³⁰⁹ *Id.* at ¶10.

timeframe for the replacement of reject structures beyond the “promptly” called for in Rule 214.A.5 for those defects “expected to endanger life or property.”³¹⁰

Mr. Bingel’s perception is likely influenced by working primarily with companies who have hired his former company Osmose for an inspection service. Those companies may offer an incomplete picture of the industry as a whole.

Third, Mr. Bingel claims that: “It is not a reasonable industry practice nor is it reasonable or appropriate engineering practice to wait more than 1 year and up to as much as 10 years before re-inspecting and/or correcting a pole after it is labeled with a red tag.”³¹¹

For “non-priority” poles, ComEd does in fact treat them immediately upon inspection with a pole treatment product from Osmose in order to control the decay, maintain the asset, and “extend the useful life” of the pole.³¹² As explained on the Osmose website: “Applying effective remedial treatments to extend the safe, reliable service-life of the pole. Remedial treatment is the key to getting the most out of your investment. The use of remedial treatments will earn dividends via extended pole life and improved plant resiliency.”³¹³

Once “non-priority” poles are discovered and immediately treated,³¹⁴ ComEd does not allow anyone (including ComEd itself) to install additional facilities to that pole without first replacing it or reinforcing it.³¹⁵

The FCC should disregard Mr. Bingel’s opinion: Mr. Bingel has never been responsible for running a major metropolitan utility. Questions of reasonableness or appropriateness are best left to those who are responsible not only for poles but for the remainder of the utility’s urban infrastructure including cables, manholes, vaults, wires, and conduits, all of which demand resources to support an evolving grid of the future.³¹⁶

Finally, Mr. Bingel claims: “Indeed, ComEd’s practices suggest that some significant number of its Non-Priority Poles may be able to accommodate attachment by Crown Castle if a loading analysis were performed. At a minimum, it is not reasonable for ComEd to apply red tag status to a significant number of poles and have those poles remain in that status for potentially many years, unavailable for additional third-party attachment or even any work by existing attaching companies.”³¹⁷

³¹⁰ *Id.* at ¶9.

³¹¹ See Declaration of Nelson Bingel, attached to Crown Castle Pole Attachment Complaint at Attachment E, at ¶26 (CCF000327).

³¹² There is an exception for treatment in that poles located on school properties, parks, playgrounds, and in wetlands do NOT receive a groundline treatment.

³¹³ Osmose Utilities Services, Inc., *Wood Pole Inspection & Life Extension* (Jul. 20, 2019), <https://www.osmose.com/pole-inspection-treatment-maintenance>; D’Hooge Declaration at ¶11.

³¹⁴ There is an exception for treatment in that poles located on school properties, parks, playgrounds, and in wetlands do NOT receive a groundline treatment.

³¹⁵ D’Hooge Declaration at ¶12.

³¹⁶ *Id.* at ¶20.

³¹⁷ See Declaration of Nelson Bingel, attached to Crown Castle Pole Attachment Complaint at Attachment E, at ¶27 (CCF000327-CCF000328).

This conclusion is based on Mr. Bingel's earlier analysis at paragraph 12 of his Declaration. Contrary to his assertions in that paragraph, he has failed to state the "actual requirement" of the NESC, as adopted in Illinois. Footnote 2 of Table 261-1A of the 2002 NESC that has been adopted in Illinois does not include the term "actual loading" or anything like it. What the referenced footnote from the applicable (2002) NESC does is call for repair or replacement when the strength is reduced to "2/3 of that required when installed."³¹⁸ The term "that required" could be interpreted to suggest actual loading, however actual loading would also involve accounting for any facilities that may have been added or removed in the intervening years. But, "when installed" precludes accounting for these changes. At a minimum, the term "actual loading" would be too broad an interpretation.³¹⁹

Perhaps Mr. Bingel is instead again mistakenly referencing the 2017 NESC which has not been adopted in Illinois and which revised this footnote to allow the incorporation of modified loads. Whatever the case, and whether or not Mr. Bingel's interpretation of the 2017 NESC is correct, the term "actual loading" is not an appropriate term to refer to the 2002 NESC in effect in Illinois. As such, Mr. Bingel's argument that relies a half dozen times on the phrase "actual loading" is misdirected and misinformed with respect to the NESC in Illinois.³²⁰

Not only is this reliance on "actual loading" inappropriate in the state of Illinois, it forms the basis of a self-serving and contradictory suggestion by Crown Castle. Using Mr. Bingel's mistaken Declaration for support, Crown and Mr. Bingel suggest that loading studies can and do confirm a "red tag" pole is available for new attachments: "when the actual loading for a pole is determined, the pole may actually be available for attachment because under the NESC the remaining strength must exceed two-thirds of the strength required to support the loading actually on the pole." Later in the paragraph, however, they both state that it is not a common industry practice for this kind of analysis to be performed: "the practice of analyzing the actual load on a red tag pole to see if it still meets code requirements is not widely applied in the industry today."³²¹

Crown Castle is therefore trying to use a nonexistent provision of the NESC in Illinois to convince the Commission that ComEd should perform a pole loading study that Crown Castle believes few in the industry perform in order to allow Crown Castle to attach its facilities to poles that have been red tagged.³²²

Crown Castle also assumes a level of precision surrounding the inspection company's strength estimation and their load calculation that is not warranted. Each of these assessments is no more than an imprecise determination, the manipulation of which results in an even less precise determination. It is therefore appropriate for ComEd to

³¹⁸ 2002 NATIONAL ELECTRICAL SAFETY CODE, Table 261-1A, n.2 (2001)

³¹⁹ D'Hooze Declaration at ¶14.

³²⁰ D'Hooze Declaration at ¶15.

³²¹ *Id.* at ¶16.

³²² *Id.* at ¶17.

determine that a pole which has failed inspection because it was shown to be deteriorated should not support additional facilities, even if an imprecise loading study later suggests it might possibly withstand additional load.³²³

Moreover, even if the NESC in effect in Illinois would make the sections covering 214.A.5.a and 214.A.5.b of the NESC Handbook applicable, and even if the unusual loading studies Crown proposes were more precise, it would be inappropriate to require utilities to design and operate their systems in accordance with the minimum standards of the NESC. As explained in the first section of the NESC, the NESC contains “basic provisions” necessary for safety, and “is not intended as a design specification or as an instruction manual.”³²⁴

To establish its engineering and design practices, many of which exceed NESC minimum code compliances, ComEd must factor in considerations related to reliability, resiliency, and planning, the safety of all those working on its poles, and the safe and efficient operation of its pole plant as a whole. It is unworkable and unsafe as a practical matter, and thus a very poor engineering and design practice, to design down to minimum code compliance without assessing these numerous other factors that affect the safety, efficiency and reliability of the system.³²⁵

Finally, as mentioned above, Mr. Bingel relies on the 2017 version of NESC Sections 214.A.5.a and 214.A.5.b for his conclusions about when priority poles should be fixed.³²⁶ Even if the 2017 NESC applied to Illinois, it agrees with the 2002 version in that neither specifies any timeline beyond “promptly” for those structures expected to endanger life or property.³²⁷

Crown Castle and Mr. Bingel have also mistakenly assumed that the poles ComEd designates as “Priority” poles are poles that endanger life or property. Such poles must “promptly” be “repaired, disconnected, or isolated,” if one properly cites the 2002 NESC in effect in Illinois, or must “promptly” be “corrected, disconnected, or isolated” if one incorrectly cites the 2017 edition of the NESC, as does Mr. Bingel. Contrary to the incorrect assumption of Crown Castle and Mr. Bingel, however, ComEd’s “Priority” red-tagged poles are not such poles that must “promptly” be “repaired, disconnected, or isolated.”

Instead, in the regular course of business, ComEd performs regular pole inspections. Any pole which upon inspection is found to present a danger to life or property is promptly repaired, disconnected or isolated, in accordance with NESC Rule 214.A.5 in effect in Illinois. Any other pole which upon inspection is found to have deteriorated below original strength by more than 33% is “red tagged” and deemed a “reject pole,”

³²³ *Id.* at ¶18.

³²⁴ 2017 NATIONAL ELECTRICAL SAFETY CODE, Rule 010.B. and 010.C. (Apr. 26, 2016); D’Hooge Declaration at ¶27.

³²⁵ D’Hooge Declaration at ¶19.

³²⁶ See Declaration of Nelson Bingel, attached to Crown Castle Pole Attachment Complaint at Attachment E, at ¶13 (CCF000325-CCF000326).

³²⁷ D’Hooge Declaration at ¶22.

consistent with Table 261-1A of the 2002 NESC in effect in Illinois.³²⁸ Poles exhibiting this deterioration or any other defect in the course of inspection are recorded, and such records of defects are maintained until the defects are corrected, in accordance with NESC Rule 214.A.4 in effect in Illinois.³²⁹

At ComEd any poles or other structures which are found to pose an immediate safety hazard are mitigated with immediate resource commitment toward isolation, repair or replacement to remove the hazard. Conditions related to wider infrastructure operation and maintenance are responsibly prioritized, managed and executed.³³⁰ Crown Castle relies on the Bingel Declaration at paragraph 27 to support these allegations.

Mr. Bingel claims: “Indeed, ComEd’s practices suggest that some significant number of its Non-Priority Poles may be able to accommodate attachment by Crown Castle if a loading analysis were performed. At a minimum, it is not reasonable for ComEd to apply red tag status to a significant number of poles and have those poles remain in that status for potentially many years, unavailable for additional third-party attachment or even any work by existing attaching companies.”³³¹

This conclusion is based on Mr. Bingel’s earlier analysis at paragraph 12 of his Declaration. Contrary to his assertions in that paragraph, he has failed to state the “actual requirement” of the NESC, as adopted in Illinois. Footnote 2 of Table 261-1A of the 2002 NESC that has been adopted in Illinois does not include the term “actual loading” or anything like it. What the referenced footnote from the applicable (2002) NESC does is call for repair or replacement when the strength is reduced to “2/3 of that required when installed.”³³² The term “that required” could be interpreted to suggest actual loading, however actual loading would also involve accounting for any facilities that may have been added or removed in the intervening years. But, “when installed” precludes accounting for these changes. At a minimum, the term “actual loading” would be too broad an interpretation.³³³

Perhaps Mr. Bingel is instead again mistakenly referencing the 2017 NESC which has not been adopted in Illinois and which revised this footnote to allow the incorporation of modified loads. Whatever the case, and whether or not Mr. Bingel’s interpretation of the 2017 NESC is correct, the term “actual loading” is not an appropriate term to refer to the 2002 NESC in effect in Illinois. As such, Mr. Bingel’s argument that relies a half dozen times on the phrase “actual loading” is misdirected and misinformed with respect to the NESC in Illinois.³³⁴

³²⁸ 2002 NATIONAL ELECTRICAL SAFETY CODE, Table 261-1A (2001).

³²⁹ Arns Declaration at ¶5.

³³⁰ D’Hooe Declaration at ¶6.

³³¹ See Declaration of Nelson Bingel, attached to Crown Castle Pole Attachment Complaint at Attachment E, at ¶27 (CCF000327-CCF000328).

³³² 2002 NATIONAL ELECTRICAL SAFETY CODE, Table 261-1A, n.2 (2001)

³³³ D’Hooe Declaration at ¶14.

³³⁴ *Id.* at ¶15.

Not only is this reliance on “actual loading” inappropriate in the state of Illinois, it forms the basis of a self-serving and contradictory suggestion by Crown Castle. Using Mr. Bingel’s mistaken Declaration for support, Crown and Mr. Bingel suggest that loading studies can and do confirm a “red tag” pole is available for new attachments: “when the actual loading for a pole is determined, the pole may actually be available for attachment because under the NESC the remaining strength must exceed two-thirds of the strength required to support the loading actually on the pole.” Later in the paragraph, however, they both state that it is not a common industry practice for this kind of analysis to be performed: “the practice of analyzing the actual load on a red tag pole to see if it still meets code requirements is not widely applied in the industry today.”³³⁵

Crown Castle is therefore trying to use a nonexistent provision of the NESC in Illinois to convince the Commission that ComEd should perform a pole loading study that Crown Castle believes few in the industry perform in order to allow Crown Castle to attach its facilities to poles that have been red tagged.³³⁶

Crown Castle also assumes a level of precision surrounding the inspection company’s strength estimation and their load calculation that is not warranted. Each of these assessments is no more than an imprecise determination, the manipulation of which results in an even less precise determination. It is therefore appropriate for ComEd to determine that a pole which has failed inspection because it was shown to be deteriorated should not support additional facilities, even if an imprecise loading study later suggests it might possibly withstand additional load.³³⁷

Moreover, even if the NESC in effect in Illinois would make the sections covering 214.A.5.a and 214.A.5.b of the NESC Handbook applicable, and even if the unusual loading studies Crown proposes were more precise, it would be inappropriate to require utilities to design and operate their systems in accordance with the minimum standards of the NESC. As explained in the first section of the NESC, the NESC contains “basic provisions” necessary for safety, and “is not intended as a design specification or as an instruction manual.”³³⁸

To establish its engineering and design practices, many of which exceed NESC minimum code compliances, ComEd must factor in considerations related to reliability, resiliency, and planning, the safety of all those working on its poles, and the safe and efficient operation of its pole plant as a whole. It is unworkable and unsafe as a practical matter, and thus a very poor engineering and design practice, to design down to minimum code compliance without assessing these numerous other factors that affect the safety, efficiency and reliability of the system.³³⁹

Finally, as mentioned above, Mr. Bingel relies on the 2017 version of NESC Sections

³³⁵ *Id.* at ¶16.

³³⁶ *Id.* at ¶17.

³³⁷ D’Hooge Declaration at ¶18.

³³⁸ 2017 NATIONAL ELECTRICAL SAFETY CODE, Rule 010.B. and 010.C. (Apr. 26, 2016); D’Hooge Declaration at ¶27.

³³⁹ D’Hooge Declaration at ¶19.

214.A.5.a and 214.A.5.b for his conclusions about when priority poles should be fixed.³⁴⁰ Even if the 2017 NESC applied to Illinois, it agrees with the 2002 version in that neither specifies any timeline beyond “promptly” for those structures expected to endanger life or property.³⁴¹

Crown Castle and Mr. Bingel have also mistakenly assumed that the poles ComEd designates as “Priority” poles are poles that endanger life or property. Such poles must “promptly” be “repaired, disconnected, or isolated,” if one properly cites the 2002 NESC in effect in Illinois, or must “promptly” be “corrected, disconnected, or isolated” if one incorrectly cites the 2017 edition of the NESC, as does Mr. Bingel. Contrary to the incorrect assumption of Crown Castle and Mr. Bingel, however, ComEd’s “Priority” red-tagged poles are not such poles that must “promptly” be “repaired, disconnected, or isolated.”

Instead, in the regular course of business, ComEd performs regular pole inspections. Any pole which upon inspection is found to present a danger to life or property is promptly repaired, disconnected or isolated, in accordance with NESC Rule 214.A.5 in effect in Illinois. Any other pole which upon inspection is found to have deteriorated below original strength by more than 33% is “red tagged” and deemed a “reject pole,” consistent with Table 261-1A of the 2002 NESC in effect in Illinois.³⁴² Poles exhibiting this deterioration or any other defect in the course of inspection are recorded, and such records of defects are maintained until the defects are corrected, in accordance with NESC Rule 214.A.4 in effect in Illinois.³⁴³

At ComEd any poles or other structures which are found to pose an immediate safety hazard are mitigated with immediate resource commitment toward isolation, repair or replacement to remove the hazard. Conditions related to wider infrastructure operation and maintenance are responsibly prioritized, managed and executed.³⁴⁴

Crown Castle 109: *In addition, as Mr. Bingel explains, to determine whether a red tagged pole is strong enough to hold an existing load or a new attachment, a utility ultimately needs to perform a pole-specific load analysis that determines the actual load on the pole, which may require less remaining strength than if the pole is assumed to be fully loaded. However, on information and belief, ComEd is not performing pole-specific load analyses on any red tagged poles.*

ComEd Answer: ComEd denies the allegations in this paragraph.

Crown Castle relies on the Bingel Declaration at paragraph 12 to support these allegations. Contrary to his assertions in that paragraph, he has failed to state the “actual requirement” of the NESC, as adopted in Illinois. Footnote 2 of Table 261-1A of the

³⁴⁰ See Declaration of Nelson Bingel, attached to Crown Castle Pole Attachment Complaint at Attachment E, at ¶13 (CCF000325-CCF000326).

³⁴¹ D’Hooge Declaration at ¶22.

³⁴² 2002 NATIONAL ELECTRICAL SAFETY CODE, Table 261-1A (2001).

³⁴³ Arns Declaration at ¶5.

³⁴⁴ D’Hooge Declaration at ¶6.

2002 NESC that has been adopted in Illinois does not include the term “actual loading” or anything like it. What the referenced footnote from the applicable (2002) NESC does is call for repair or replacement when the strength is reduced to “2/3 of that required when installed.”³⁴⁵ The term “that required” could be interpreted to suggest actual loading, however actual loading would also involve accounting for any facilities that may have been added or removed in the intervening years. But, “when installed” precludes accounting for these changes. At a minimum, the term “actual loading” would be too broad an interpretation.³⁴⁶

Perhaps Mr. Bingel is instead again mistakenly referencing the 2017 NESC which has not been adopted in Illinois and which revised this footnote to allow the incorporation of modified loads. Whatever the case, and whether or not Mr. Bingel’s interpretation of the 2017 NESC is correct, the term “actual loading” is not an appropriate term to refer to the 2002 NESC in effect in Illinois. As such, Mr. Bingel’s argument that relies a half dozen times on the phrase “actual loading” is misdirected and misinformed with respect to the NESC in Illinois.³⁴⁷

Not only is this reliance on “actual loading” inappropriate in the state of Illinois, it forms the basis of a self-serving and contradictory suggestion by Crown Castle. Using Mr. Bingel’s mistaken Declaration for support, Crown and Mr. Bingel suggest that loading studies can and do confirm a “red tag” pole is available for new attachments: “when the actual loading for a pole is determined, the pole may actually be available for attachment because under the NESC the remaining strength must exceed two-thirds of the strength required to support the loading actually on the pole.” Later in the paragraph, however, they both state that it is not a common industry practice for this kind of analysis to be performed: “the practice of analyzing the actual load on a red tag pole to see if it still meets code requirements is not widely applied in the industry today.”³⁴⁸

Crown Castle is therefore trying to use a nonexistent provision of the NESC in Illinois to convince the Commission that ComEd should perform a pole loading study that Crown Castle believes few in the industry perform in order to allow Crown Castle to attach its facilities to poles that have been red tagged.³⁴⁹

Crown Castle also assumes a level of precision surrounding the inspection company’s strength estimation and their load calculation that is not warranted. Each of these assessments is no more than an imprecise determination, the manipulation of which results in an even less precise determination. It is therefore appropriate for ComEd to determine that a pole which has failed inspection because it was shown to be deteriorated should not support additional facilities, even if an imprecise loading study later suggests it might possibly withstand additional load.³⁵⁰

³⁴⁵ 2002 NATIONAL ELECTRICAL SAFETY CODE, Table 261-1A, n.2 (2001)

³⁴⁶ *Id.* at ¶14.

³⁴⁷ *Id.* at ¶15.

³⁴⁸ *Id.* at ¶16.

³⁴⁹ *Id.* at ¶17.

³⁵⁰ *Id.* at ¶18.

Moreover, even if the NESC in effect in Illinois would make the sections covering 214.A.5.a and 214.A.5.b of the NESC Handbook applicable, and even if the unusual loading studies Crown proposes were more precise, it would be inappropriate to require utilities to design and operate their systems in accordance with the minimum standards of the NESC. As explained in the first section of the NESC, the NESC contains “basic provisions” necessary for safety, and “is not intended as a design specification or as an instruction manual.”³⁵¹

To establish its engineering and design practices, many of which exceed NESC minimum code compliances, ComEd must factor in considerations related to reliability, resiliency, and planning, the safety of all those working on its poles, and the safe and efficient operation of its pole plant as a whole. It is unworkable and unsafe as a practical matter, and thus a very poor engineering and design practice, to design down to minimum code compliance without assessing these numerous other factors that affect the safety, efficiency and reliability of the system.³⁵²

Finally, as mentioned above, Mr. Bingel relies on the 2017 version of NESC Sections 214.A.5.a and 214.A.5.b for his conclusions about when priority poles should be fixed.³⁵³ Even if the 2017 NESC applied to Illinois, it agrees with the 2002 version in that neither specifies any timeline beyond “promptly” for those structures expected to endanger life or property.³⁵⁴

Crown Castle and Mr. Bingel have also mistakenly assumed that the poles ComEd designates as “Priority” poles are poles that endanger life or property. Such poles must “promptly” be “repaired, disconnected, or isolated,” if one properly cites the 2002 NESC in effect in Illinois, or must “promptly” be “corrected, disconnected, or isolated” if one incorrectly cites the 2017 edition of the NESC, as does Mr. Bingel. Contrary to the incorrect assumption of Crown Castle and Mr. Bingel, however, ComEd’s “Priority” red-tagged poles are not such poles that must “promptly” be “repaired, disconnected, or isolated.”

Instead, in the regular course of business, ComEd performs regular pole inspections. Any pole which upon inspection is found to present a danger to life or property is promptly repaired, disconnected or isolated, in accordance with NESC Rule 214.A.5 in effect in Illinois. Any other pole which upon inspection is found to have deteriorated below original strength by more than 33% is “red tagged” and deemed a “reject pole,” consistent with Table 261-1A of the 2002 NESC in effect in Illinois.³⁵⁵ Poles exhibiting this deterioration or any other defect in the course of inspection are recorded, and such records of defects are maintained until the defects are corrected, in accordance with

³⁵¹ 2017 NATIONAL ELECTRICAL SAFETY CODE, Rule 010.B. and 010.C. (Apr. 26, 2016); D’Hooe Declaration at ¶27.

³⁵² D’Hooe Declaration at ¶19.

³⁵³ See Declaration of Nelson Bingel, attached to Crown Castle Pole Attachment Complaint at Attachment E, at ¶13 (CCF000325-CCF000326).

³⁵⁴ D’Hooe Declaration at ¶22.

³⁵⁵ 2002 NATIONAL ELECTRICAL SAFETY CODE, Table 261-1A (2001).

NESC Rule 214.A.4 in effect in Illinois.³⁵⁶

At ComEd any poles or other structures which are found to pose an immediate safety hazard are mitigated with immediate resource commitment toward isolation, repair or replacement to remove the hazard. Conditions related to wider infrastructure operation and maintenance are responsibly prioritized, managed and executed.³⁵⁷

ComEd also denies that it does not perform pole loading analyses on any red-tagged poles. ComEd does perform load calculations on Non-Priority red tagged poles as a prioritization mechanism. ComEd's contractor Osmose performs the load calculation using Osmose's "LoadCalc" software, and performs the calculation on all non-priority poles the week following inspection when the pole is being inspected on the ten-year cycle. The load calculation performed by Osmose is just an estimate which cannot determine what the exact load is but can provide enough of a determination to further classify the poles. Once the load calculation is done, ComEd further categorizes the poles for prioritization.³⁵⁸

Immediately upon inspection, ComEd treats "non-priority" poles with a pole treatment product from Osmose in order to control the decay, maintain the asset, and "extend the useful life" of the pole.³⁵⁹ As explained on the Osmose website: "Applying effective remedial treatments to extend the safe, reliable service-life of the pole. Remedial treatment is the key to getting the most out of your investment. The use of remedial treatments will earn dividends via extended pole life and improved plant resiliency."³⁶⁰

Once "non-priority" poles are discovered and immediately treated,³⁶¹ ComEd does not allow anyone (including ComEd itself) to install additional facilities to that pole without first replacing it or reinforcing it.³⁶²

Crown Castle 110: *ComEd has refused to perform a pole-specific load analysis on red tagged poles to determine whether these poles can be strengthened through reinforcement.*

ComEd Answer:

The determination whether to replace or reinforce a pole is a design decision driven by the location of the decay, the size of the decay, the location of risers, the direction of the load, the extent of electric facilities, the height of the banding, whether the pole top is

³⁵⁶ Arns Declaration at ¶5.

³⁵⁷ D'Hooze Declaration at ¶6.

³⁵⁸ Tyschenko Declaration at ¶5.

³⁵⁹ There is an exception for treatment in that poles located on school properties, parks, playgrounds, and in wetlands do NOT receive a groundline treatment.

³⁶⁰ Osmose Utilities Services, Inc., Wood Pole Services, *Wood Pole Inspection & Life Extension* (Jul. 20, 2019), <https://www.osmose.com/pole-inspection-treatment-maintenance>; Tyschenko Declaration at ¶6.

³⁶¹ There is an exception for treatment in that poles located on school properties, parks, playgrounds, and in wetlands do NOT receive a groundline treatment.

³⁶² Tyschenko Declaration at ¶7.

decayed, whether there are woodpecker holes, and dozens of other factors.³⁶³

A large part of the reason Crown Castle must replace the overwhelming majority of “red tag” poles rather than reinforce them is because two-thirds of the distribution poles in Chicago are three-phase poles, which carry a lot of electric load and which affect a large number of electric customers, and most of Crown Castle’s attachments are in Chicago and similarly population dense areas. Because of the importance of these poles, the need to maximize reliability and resiliency for the extensive customers they serve, ComEd’s nondiscriminatory policy is that red-tagged three-phase poles must be replaced, not just for Crown Castle but for ComEd and any other entity seeking to install new facilities.³⁶⁴

It would be inappropriate to require utilities to design and operate their systems in accordance with the minimum standards of the NESC. As explained in the first section of the NESC, the NESC contains “basic provisions” necessary for safety, and “is not intended as a design specification or as an instruction manual.”³⁶⁵

From June 2017 to March 2019, and before, for attachment of its own facilities, ComEd remedied “red tag” poles through reinforcement in some cases rather than pole replacement in every case.³⁶⁶

ComEd’s policy was not to allow third parties like Crown Castle to reinforce poles during this same period based on a discretionary judgment. In any event, only a small subset of red-tagged poles might qualify under the same guidelines to be reinforced.³⁶⁷

Crown Castle III: *Refusing to perform a pole-specific load analysis on red tagged poles to determine whether these poles are able to accommodate Crown Castle’s proposed attachment, or even to determine whether the pole can be strengthened through reinforcement, is unreasonable.*

ComEd Answer: ComEd denies the allegations in this paragraph.

The determination whether to replace or reinforce a pole is a design decision driven by the location of the decay, the size of the decay, the location of risers, the direction of the load, the extent of electric facilities, the height of the banding, whether the pole top is decayed, whether there are woodpecker holes, and dozens of other factors.³⁶⁸

A large part of the reason Crown Castle must replace the overwhelming majority of “red tag” poles rather than reinforce them is because two-thirds of the distribution poles in Chicago are three-phase poles, which carry a lot of electric load and which affect a large number of electric customers, and most of Crown Castle’s attachments are in Chicago and similarly population dense areas. Because of the importance of these poles, the need

³⁶³ Arns Declaration at ¶15.

³⁶⁴ *Id.* at ¶18.

³⁶⁵ 2017 NATIONAL ELECTRICAL SAFETY CODE, Rule 010.B. and 010.C. (Apr. 26, 2016)

³⁶⁶ Arns Declaration at ¶16.

³⁶⁷ *Id.* at ¶17.

³⁶⁸ Arns Declaration at ¶15.

to maximize reliability and resiliency for the extensive customers they serve, ComEd's nondiscriminatory policy is that red-tagged three-phase poles must be replaced, not just for Crown Castle but for ComEd and any other entity seeking to install new facilities.³⁶⁹

It would be inappropriate to require utilities to design and operate their systems in accordance with the minimum standards of the NESC. As explained in the first section of the NESC, the NESC contains "basic provisions" necessary for safety, and "is not intended as a design specification or as an instruction manual."³⁷⁰

From June 2017 to March 2019, and before, for attachment of its own facilities, ComEd remedied "red tag" poles through reinforcement in some cases rather than pole replacement in every case.³⁷¹

ComEd's policy was not to allow third parties like Crown Castle to reinforce poles during this same period based on a discretionary judgment. In any event, only a small subset of red-tagged poles might qualify under the same guidelines to be reinforced.³⁷²

Crown Castle 112: *In summary, ComEd's denial of access based on red tag status, particularly when ComEd has not provided any justification for prohibiting Crown Castle to attach to "red tag" poles, does not satisfy the requirements to justify denial set forth in 47 C.F.R. § 1.1403.*

ComEd Answer: ComEd denies the allegations in this paragraph. ComEd has not denied Crown Castle or other entities access to its red tagged poles because Crown Castle and other entities (including ComEd) can pay the cost of replacing or reinforcing those poles whenever they need access. Paragraph 112 of the Complaint contains legal conclusions to which no response is required. To the extent a response is required, the allegations of Paragraph 112 are denied.

Crown Castle 113: *To the extent that red tag status might, arguably constitute a "safety, reliability [or] generally applicable engineering" issue, it does not justify denial under Section 224(f)(2) because it is a safety, reliability, or generally applicable engineering issue that is a pre-existing condition that ComEd is required to have corrected in a timely fashion. ComEd's failure to correct pre-existing conditions in a timely fashion cannot create lawful grounds for denial of access.*

ComEd Answer: ComEd denies the allegations in this paragraph as misdirected and uninformed. Mr. Bingel's entire Declaration relies on the assumption that Rules 214.A.5.a and 214.A.5.b of the 2017 NESC has been adopted in Illinois, and since Mr. Bingel's Declaration makes no mention at all of the relevant Rules 214.A.4 and .5 in Illinois, much less provides any analysis of it, the opinions expressed in his Declaration are misdirected and uninformed.³⁷³

³⁶⁹ *Id.* at ¶18.

³⁷⁰ 2017 NATIONAL ELECTRICAL SAFETY CODE, Rule 010.B. and 010.C. (Apr. 26, 2016).

³⁷¹ Arns Declaration at ¶16.

³⁷² *Id.* at ¶17.

³⁷³ D'Hooe Declaration at ¶5.

Equally misdirected and uninformed are Crown Castle's and Mr. Bingel's assumptions that the poles ComEd designates as "Priority" poles are poles that endanger life or property. Such poles must "promptly" be "repaired, disconnected, or isolated," if one properly cites the 2002 NESC in effect in Illinois, or must "promptly" be "corrected, disconnected, or isolated" if one incorrectly cites the 2017 edition of the NESC, as does Mr. Bingel. Contrary to the incorrect assumption of Crown Castle and Mr. Bingel, however, ComEd's "Priority" red-tagged poles are not such poles that must "promptly" be "repaired, disconnected, or isolated."

Instead, in the regular course of business, ComEd performs regular pole inspections. Any pole which upon inspection is found to present a danger to life or property is promptly repaired, disconnected or in accordance with NESC Rule 214.A.5 in effect in Illinois. Any other pole which upon inspection is found to have deteriorated below original strength by more than 33% is "red tagged" and deemed a "reject pole," consistent with Table 261-1A of the 2002 NESC in effect in Illinois.³⁷⁴ Poles exhibiting this deterioration or any other defect in the course of inspection are recorded, and such records of defects are maintained until the defects are corrected, in accordance with NESC Rule 214.A.4 in effect in Illinois.³⁷⁵

Furthermore, all poles have "preexisting conditions." But importantly, these poles do not have "preexisting safety violations." The "red tagged" poles that Crown Castle references in this proceeding do not qualify as "red tagged" poles as defined by the Commission in footnote 450 of the OTMR Order. The OTMR Order defines a "red tagged" pole as one that is "found to be non-compliant with safety standards."³⁷⁶ The poles at issue in this proceeding do not violate safety standards as Crown Castle would like the Commission to believe.

Instead, as explained above, in the regular course of business, ComEd performs regular pole inspections. Any pole which upon inspection is found to present a danger to life or property is promptly repaired, disconnected or isolated, in accordance with NESC Rule 214.A.5 in effect in Illinois. Any other pole which upon inspection is found to have deteriorated below original strength by more than 33% is "red tagged" and deemed a "reject pole," consistent with Table 261-1A of the 2002 NESC in effect in Illinois.³⁷⁷ Poles exhibiting this deterioration or any other defect in the course of inspection are recorded, and such records of defects are maintained until the defects are corrected, in accordance with NESC Rule 214.A.4 in effect in Illinois. This activity is in accordance with the NESC, not a violation of the NESC.³⁷⁸

The Complaint does not demonstrate any NESC violations. Crown cites the 2017 edition of the NESC at Rules 214.A.5.a. and b. which (as explained above) are not in effect in

³⁷⁴ 2002 NATIONAL ELECTRICAL SAFETY CODE, Table 261-1A (2001).

³⁷⁵ Arns Declaration at ¶5.

³⁷⁶ OTMR Order at n.450.

³⁷⁷ 2002 NATIONAL ELECTRICAL SAFETY CODE, Table 261-1A (2001).

³⁷⁸ See Arns Declaration at ¶¶4-5.

Illinois, but nevertheless ComEd's practices do not violate these provisions anyway. And, as explained above, ComEd's practices also do not violate the 2002 Code Section that actually is in effect in Illinois, but which was not even addressed by the Complaint. ComEd has not failed to replace or reinforce these poles in a timely manner, and so the NESC has not been violated.³⁷⁹

Because the poles in this proceeding do not have preexisting safety violations, they are not the same "red tagged" poles defined in the OTMR Order. As a result, the OTMR Order provisions applicable to "red tagged" poles do not apply.

The poles at issue in this proceeding are at full capacity based on ComEd's engineering and reliability standards, which ComEd imposes on all attachers including itself in a nondiscriminatory manner. For new attachments to be accommodated, ComEd must expand capacity by installing a replacement pole (or by reinforcing the existing pole, if appropriate). In most cases, therefore, Crown Castle is asking that the Commission require ComEd to expand capacity to accommodate Crown Castle's attachment requests. It has been long established, however, that the Commission cannot require utilities to expand capacity by installing taller poles.

The Pole Attachment Act allows utilities to deny access for lack of capacity:

Notwithstanding paragraph (1), a utility providing electric service may deny a cable television system or any telecommunications carrier access to its poles, ducts, conduits, or rights-of-way, on a non-discriminatory basis where there is insufficient capacity and for reasons of safety, reliability and generally applicable engineering purposes.³⁸⁰

Accordingly, electric utilities need not expand capacity to accommodate attaching entities.³⁸¹ The Commission agrees. As explained in the April 2011 Pole Attachment Order: "[A]s the court noted in *Southern Company*, mandating the construction of new capacity is beyond the Commission's authority."³⁸²

The poles at issue in this proceeding that have been "red tagged" for later replacement are poles that the NESC does not require to be replaced right away, as they do not endanger

³⁷⁹ See Arns Declaration at ¶¶4-5.

³⁸⁰ 47 U.S.C. §224(f)(2) (2010).

³⁸¹ This determination has been upheld by the 11th Circuit. In *Southern Company v. FCC*, utility petitioners objected to the Commission's 1999 decision that "utilities must expand pole capacity to accommodate requests for attachment in situations where it is agreed that there is insufficient capacity on a given pole to permit third-party pole attachments." *Southern Co. v. FCC*, 292 F.3d 1338, 1347 (11th Cir. 2002), quoting *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499 (1996), *aff'd*, Order on Reconsideration, 14 FCC Rcd 18049 (1999). The 11th Circuit held that the plain language of Section 224(f)(2) explicitly prevents the Commission from mandating pole replacements: "When it is agreed that capacity is insufficient, there is no obligation to provide third parties with access to that particular 'pole, duct, conduit, or right-of-way.'" *Southern Co. v. FCC*, 292 F.3d 1338, 1347 (11th Cir. 2002). The court further noted that "the FCC's attempt to mandate capacity expansion is outside of its purview under the plain language of the statute." *Id.*

³⁸² April 2011 Pole Attachment Order at ¶ 95.

life or property, and have been treated to maintain and extend their present reliable state of service. As such, Crown Castle's request for a ruling that they be replaced immediately is a rule requiring utilities to expand capacity, which the Pole Attachment Act prohibits. Consistent with the Pole Attachment Act, Crown Castle's request for capacity expansion should be denied.

Crown Castle 114: *In addition, ComEd's treatment of red tagged pole is not consistent with standard industry practice.*

ComEd Answer: ComEd denies the allegations in this paragraph.

Crown Castle relies on the Bingel Declaration for this conclusion. Mr. Bingel, however, relies for this conclusion and others in his Declaration on NESC Rule 214.A.5.a and 214.A.5.b.³⁸³ In the 2017 edition of the NESC, NESC Rule 214.A.5. states:

214. Inspection and tests of lines and equipment

....

5. Corrections

- a. Lines and equipment with recorded conditions or defects that would reasonably be expected to endanger human life or property shall be promptly corrected, disconnected, or isolated.
- b. Other conditions or defects shall be designated for correction.³⁸⁴

Somehow Mr. Bingel is unaware that the version of the NESC adopted in Illinois does not contain Rules 214.A.5.a and 214.A.5.b. The version of the NESC adopted in Illinois is the 2002 version of the Code.³⁸⁵ Instead, the relevant rule for this analysis are Rules 214.A.4 and .5, which in the 2002 NESC adopted by Illinois reads:

214. Inspection and Tests of Lines and Equipment

....

4. Record of Defects

Any defects affecting compliance with this code revealed by inspection or tests, if not promptly corrected, shall be recorded; such records shall be maintained until the defect is corrected.

5. Remedying Defects

³⁸³ See Declaration of Nelson Bingel, attached to Crown Castle Pole Attachment Complaint at Attachment E, at ¶13 (CCF000325-CCF000326).

³⁸⁴ 2017 NATIONAL ELECTRICAL SAFETY CODE, Rule 214.A.5.a-b. (Apr. 26, 2016).

³⁸⁵ ILL. ADMIN. CODE tit. 83, § 305.20 (2003).

Lines and equipment with recorded defects that could reasonably be expected to endanger life or property shall be promptly repaired, disconnected, or isolated.³⁸⁶

Since Mr. Bingel’s entire Declaration relies on the assumption that Rules 214.A.5.a and 214.A.5.b of the 2017 NESC has been adopted in Illinois, and since Mr. Bingel’s Declaration makes no mention at all of the relevant Rules 214.A.4 and .5 in Illinois, much less provides any analysis of it, the opinions expressed in his Declaration are misdirected and uninformed.³⁸⁷

Equally misdirected and uninformed are Crown Castle’s and Mr. Bingel’s assumptions that the poles ComEd designates as “Priority” poles are poles that endanger life or property. Such poles must “promptly” be “repaired, disconnected, or isolated,” if one properly cites the 2002 NESC in effect in Illinois, or must “promptly” be “corrected, disconnected, or isolated” if one incorrectly cites the 2017 edition of the NESC, as does Mr. Bingel. Contrary to the incorrect assumption of Crown Castle and Mr. Bingel, however, ComEd’s “Priority” red-tagged poles are not such poles that must “promptly” be “repaired, disconnected, or isolated.”

Instead, in the regular course of business, ComEd performs regular pole inspections. Any pole which upon inspection is found to present a danger to life or property is promptly repaired, disconnected or isolated, in accordance with NESC Rule 214.A.5 in effect in Illinois. Any other pole which upon inspection is found to have deteriorated below original strength by more than 33% is “red tagged” and deemed a “reject pole,” consistent with Table 261-1A of the 2002 NESC in effect in Illinois.³⁸⁸ Poles exhibiting this deterioration or any other defect in the course of inspection are recorded, and such records of defects are maintained until the defects are corrected, in accordance with NESC Rule 214.A.4 in effect in Illinois.³⁸⁹

For both “priority” and “non-priority” poles, there is no “industry standard” that details a timeframe for the replacement of reject structures beyond the “promptly” called for in Rule 214.A.5 for those defects “expected to endanger life or property.”³⁹⁰ At ComEd any poles or other structures which are found to pose an immediate safety hazard are mitigated with immediate resource commitment toward isolation, repair or replacement to remove the hazard. Conditions related to wider infrastructure operation and maintenance are responsibly prioritized, managed and executed.³⁹¹

As a person with extensive experience in the Standards community, Mr. Bingel should be well aware of the thresholds necessary to create an industry standard as opposed to a “typical” or a “common” practice. Unlike industry standards, what might be considered

³⁸⁶ 2002 NATIONAL ELECTRICAL SAFETY CODE, Rule 214.A.4-.5 (2001); D’Hooge Declaration at ¶4.

³⁸⁷ *Id.* at ¶5.

³⁸⁸ 2002 NATIONAL ELECTRICAL SAFETY CODE, Table 261-1A (2001).

³⁸⁹ Arns Declaration at ¶5.

³⁹⁰ D’Hooge Declaration at ¶9.

³⁹¹ *Id.* at ¶6.

to be “typical” or “common” practices can be influenced by perception. Mr. Bingel’s perception is likely influenced by working primarily with companies who have hired his former company Osmose for an inspection service. Those companies may offer an incomplete picture of the industry as a whole.³⁹²

And finally, for “non-priority” poles, ComEd does in fact treat them immediately upon inspection with a pole treatment product from Osmose in order to control the decay, maintain the asset, and “extend the useful life” of the pole.³⁹³ As explained on the Osmose website: “Applying effective remedial treatments to extend the safe, reliable service-life of the pole. Remedial treatment is the key to getting the most out of your investment. The use of remedial treatments will earn dividends via extended pole life and improved plant resiliency.”³⁹⁴

Once “non-priority” poles are discovered and immediately treated,³⁹⁵ ComEd does not allow anyone (including ComEd itself) to install additional facilities to that pole without first replacing it or reinforcing it.³⁹⁶

Crown Castle 115: *Accordingly, the Commission should declare that ComEd’s practice of denying access to poles labeled “red tag” is unlawful and order ComEd to permit Crown Castle immediately to install its facilities on “red tag” poles to the extent permitted by the NESC.*

ComEd Answer: For the reasons already stated, ComEd denies the allegations in this paragraph.

Crown Castle 116: *If these “red tag” poles created imminent danger, ComEd should have replaced them within 90 days.*

ComEd Answer: ComEd denies the allegations in this paragraph. Since Mr. Bingel’s entire Declaration relies on the assumption that Rules 214.A.5.a and 214.A.5.b of the 2017 NESC has been adopted in Illinois, and since Mr. Bingel’s Declaration makes no mention at all of the relevant Rules 214.A.4 and .5 in Illinois, much less provides any analysis of it, the opinions expressed in his Declaration are misdirected and uninformed.³⁹⁷

Equally misdirected and uninformed are Crown Castle’s and Mr. Bingel’s assumptions that the poles ComEd designates as “Priority” poles are poles that endanger life or property. Such poles must “promptly” be “repaired, disconnected, or isolated,” if one properly cites the 2002 NESC in effect in Illinois, or must “promptly” be “corrected,

³⁹² *Id.* at ¶10.

³⁹³ There is an exception for treatment in that poles located on school properties, parks, playgrounds, and in wetlands do NOT receive a groundline treatment.

³⁹⁴ Osmose Utilities Services, Inc., Wood Pole Services, *Wood Pole Inspection & Life Extension* (Jul. 20, 2019), <https://www.osmose.com/pole-inspection-treatment-maintenance>; D’Hooge Declaration at ¶11.

³⁹⁵ There is an exception for treatment in that poles located on school properties, parks, playgrounds, and in wetlands do NOT receive a groundline treatment.

³⁹⁶ D’Hooge Declaration at ¶12.

³⁹⁷ *Id.* at ¶5.

disconnected, or isolated” if one incorrectly cites the 2017 edition of the NESC, as does Mr. Bingel. Contrary to the incorrect assumption of Crown Castle and Mr. Bingel, however, ComEd’s “Priority” red-tagged poles are not such poles that must “promptly” be “repaired, disconnected, or isolated.”

Instead, in the regular course of business, ComEd performs regular pole inspections. Any pole which upon inspection is found to present a danger to life or property is promptly repaired, disconnected or isolated, in accordance with NESC Rule 214.A.5 in effect in Illinois. Any other pole which upon inspection is found to have deteriorated below original strength by more than 33% is “red tagged” and deemed a “reject pole,” consistent with Table 261-1A of the 2002 NESC in effect in Illinois.³⁹⁸ Poles exhibiting this deterioration or any other defect in the course of inspection are recorded, and such records of defects are maintained until the defects are corrected, in accordance with NESC Rule 214.A.4 in effect in Illinois.³⁹⁹

Crown Castle 117: *Under Rule 214 of the NESC, pole owners must promptly correct “lines and equipment with recorded conditions or defects that would reasonably be expected to endanger human life or property.” Rule 214.A.5(b) states “Other conditions or defects shall be designated for correction.”*

ComEd Answer: ComEd admits that Rule 214 of the 2017 edition of the NESC contains this language, but ComEd denies that Rule 214 of the 2002 edition of the NESC that is in effect in Illinois contains this language.

In the 2017 edition of the NESC, NESC Rule 214.A.5. states:

214. Inspection and tests of lines and equipment

....

5. Corrections

- a. Lines and equipment with recorded conditions or defects that would reasonably be expected to endanger human life or property shall be promptly corrected, disconnected, or isolated.
- b. Other conditions or defects shall be designated for correction.⁴⁰⁰

The version of the NESC adopted in Illinois does not contain Rules 214.A.5.a or 214.A.5.b.⁴⁰¹ The version of the NESC adopted in Illinois is the 2002 version of the Code.⁴⁰² Instead, the relevant rule for this analysis are Rules 214.A.4 and .5, which in the 2002 NESC adopted by Illinois reads:

³⁹⁸ 2002 NATIONAL ELECTRICAL SAFETY CODE, Table 261-1A (2001).

³⁹⁹ Arns Declaration at ¶5.

⁴⁰⁰ 2017 NATIONAL ELECTRICAL SAFETY CODE, Rule 214.A.5.a-b. (Apr. 26, 2016).

⁴⁰¹ D’Hooge Declaration at ¶23.

⁴⁰² ILL. ADMIN. CODE tit. 83, § 305.20 (2003).

214. Inspection and Tests of Lines and Equipment

....

4. Record of Defects

Any defects affecting compliance with this code revealed by inspection or tests, if not promptly corrected, shall be recorded; such records shall be maintained until the defect is corrected.

5. Remedying Defects

Lines and equipment with recorded defects that could reasonably be expected to endanger life or property shall be promptly repaired, disconnected, or isolated.⁴⁰³

Since Crown Castle's argument relies on the assumption that Rule 214.A.5.a and 214.A.5.b of the 2017 NESC has been adopted in Illinois, and since Crown Castle makes no mention at all of the relevant Rules 214.A.4 and .5 in Illinois, much less provides any analysis of it, Crown Castle's allegations in paragraphs 117-120 are misdirected and uninformed.⁴⁰⁴

Equally misdirected and uninformed are Crown Castle's and Mr. Bingel's assumptions that the poles ComEd designates as "Priority" poles are poles that endanger life or property. Such poles must "promptly" be "repaired, disconnected, or isolated," if one properly cites the 2002 NESC in effect in Illinois, or must "promptly" be "corrected, disconnected, or isolated" if one incorrectly cites the 2017 edition of the NESC, as does Mr. Bingel. Contrary to the incorrect assumption of Crown Castle and Mr. Bingel, however, ComEd's "Priority" red-tagged poles are not such poles that must "promptly" be "repaired, disconnected, or isolated."

Instead, in the regular course of business, ComEd performs regular pole inspections. Any pole which upon inspection is found to present a danger to life or property is promptly repaired, disconnected or isolated, in accordance with NESC Rule 214.A.5 in effect in Illinois. Any other pole which upon inspection is found to have deteriorated below original strength by more than 33% is "red tagged" and deemed a "reject pole," consistent with Table 261-1A of the 2002 NESC in effect in Illinois.⁴⁰⁵ Poles exhibiting this deterioration or any other defect in the course of inspection are recorded, and such records of defects are maintained until the defects are corrected, in accordance with NESC Rule 214.A.4 in effect in Illinois.⁴⁰⁶

⁴⁰³ 2002 NATIONAL ELECTRICAL SAFETY CODE, Rule 214.A.4-.5 (2001).

⁴⁰⁴ D'Hooze Declaration at ¶24.

⁴⁰⁵ 2002 NATIONAL ELECTRICAL SAFETY CODE, Table 261-1A (2001).

⁴⁰⁶ Arns Declaration at ¶5.

At ComEd any poles or other structures which are found to pose an immediate safety hazard are mitigated with immediate resource commitment toward isolation, repair or replacement to remove the hazard. Conditions related to wider infrastructure operation and maintenance are responsibly prioritized, managed and executed.⁴⁰⁷

Crown Castle 118: *However, according to guidance provided in the NESC Handbook, if the noncompliant conditions or defects are not life threatening, new work can be performed prior to the correction of the non-compliant conditions or defects if “(a) the new addition would not create a new noncompliant condition, (b) worsen an existing noncompliant condition, or (c) overload the structure.”*

ComEd Answer: ComEd admits that the 2017 version of the NESC Handbook contains this language, but denies that the 2017 version of the NESC Handbook is appropriate to use in this context.⁴⁰⁸

Since Crown Castle’s argument relies on the assumption that Rules 214.A.5.a and 214.A.5.b of the 2017 NESC has been adopted in Illinois, and since Crown Castle makes no mention at all of the relevant Rules 214.A.4 and .5 in Illinois, much less provides any analysis of it, Crown Castle’s allegations in paragraphs 117-120 are misdirected and uninformed.⁴⁰⁹

Even assuming the NESC Handbook were appropriate to reference in this context, the relevant assertions made above are not included in the 2002 version of the NESC Handbook.⁴¹⁰

ComEd treats its “non-priority” red tag poles immediately upon inspection with a pole treatment product from Osmose in order to control the decay, maintain the asset, and “extend the useful life” of the pole.⁴¹¹ As explained on the Osmose website: “Applying effective remedial treatments to extend the safe, reliable service-life of the pole. Remedial treatment is the key to getting the most out of your investment. The use of remedial treatments will earn dividends via extended pole life and improved plant resiliency.”⁴¹²

Once “non-priority” poles are discovered and immediately treated,⁴¹³ ComEd does not allow anyone (including ComEd itself) to install additional facilities to that pole without first replacing it or reinforcing it.⁴¹⁴

⁴⁰⁷ D’Hooge Declaration at ¶6.

⁴⁰⁸ *Id.* at ¶25.

⁴⁰⁹ *Id.* at ¶24.

⁴¹⁰ *Id.* at ¶26.

⁴¹¹ There is an exception for treatment in that poles located on school properties, parks, playgrounds, and in wetlands do NOT receive a groundline treatment.

⁴¹² Osmose Utilities Services, Inc., Wood Pole Services, *Wood Pole Inspection & Life Extension* (Jul. 20, 2019), <https://www.osmose.com/pole-inspection-treatment-maintenance>.

⁴¹³ There is an exception for treatment in that poles located on school properties, parks, playgrounds, and in wetlands do NOT receive a groundline treatment.

⁴¹⁴ D’Hooge Declaration at ¶12.

Furthermore, even if the NESC in effect in Illinois would make the sections covering 214.A.5.a and 214.A.5.b of the NESC Handbook applicable, and even if the unusual loading studies Crown proposes were more precise, it would be inappropriate to require utilities to design and operate their systems in accordance with the minimum standards of the NESC. As explained in the first section of the NESC, the NESC contains “basic provisions” necessary for safety, and “is not intended as a design specification or as an instruction manual.”⁴¹⁵

To establish its engineering and design practices, many of which exceed NESC minimum code compliances, ComEd must factor in considerations related to reliability, resiliency, and planning, the safety of all those working on its poles, and the safe and efficient operation of its pole plant as a whole. It is unworkable and unsafe as a practical matter, and thus a very poor engineering and design practice, to design down to minimum code compliance without assessing these numerous other factors that affect the safety, efficiency and reliability of the system.⁴¹⁶

At ComEd any poles or other structures which are found to pose an immediate safety hazard are mitigated with immediate resource commitment toward isolation, repair or replacement to remove the hazard. Conditions related to wider infrastructure operation and maintenance are responsibly prioritized, managed and executed.⁴¹⁷

Crown Castle 119: *Therefore, replacing red-tagged poles that are not an immediate danger should not be a condition precedent to attachment.*

ComEd Answer: ComEd denies the allegations in this paragraph. Since Crown Castle’s argument relies on the assumption that Rules 214.A.5.a and 214.A.5.b of the 2017 NESC has been adopted in Illinois, and since Crown Castle makes no mention at all of the relevant Rules 214.A.4 and .5 in Illinois, much less provides any analysis of it, Crown Castle’s allegations in paragraphs 117-120 are misdirected and uninformed.⁴¹⁸

Even assuming the NESC Handbook were appropriate to reference in this context, the relevant assertions made above are not included in the 2002 version of the NESC Handbook.⁴¹⁹

ComEd treats its “non-priority” red tag poles immediately upon inspection with a pole treatment product from Osmose in order to control the decay, maintain the asset, and “extend the useful life” of the pole.⁴²⁰ As explained on the Osmose website: “Applying effective remedial treatments to extend the safe, reliable service-life of the pole.

⁴¹⁵ 2017 NATIONAL ELECTRICAL SAFETY CODE, Rule 010.B. and 010.C. (Apr. 26, 2016); D’Hooe Declaration at ¶27.

⁴¹⁶ D’Hooe Declaration at ¶19.

⁴¹⁷ *Id.* at ¶6.

⁴¹⁸ *Id.* at ¶24.

⁴¹⁹ *Id.* at ¶26.

⁴²⁰ There is an exception for treatment in that poles located on school properties, parks, playgrounds, and in wetlands do NOT receive a groundline treatment.

Remedial treatment is the key to getting the most out of your investment. The use of remedial treatments will earn dividends via extended pole life and improved plant resiliency.”⁴²¹

Once “non-priority” poles are discovered and immediately treated,⁴²² ComEd does not allow anyone (including ComEd itself) to install additional facilities to that pole without first replacing it or reinforcing it.⁴²³

Furthermore, even if the NESC in effect in Illinois would make the sections covering 214.A.5.a and 214.A.5.b of the NESC Handbook applicable, and even if the unusual loading studies Crown proposes were more precise, it would be inappropriate to require utilities to design and operate their systems in accordance with the minimum standards of the NESC. As explained in the first section of the NESC, the NESC contains “basic provisions” necessary for safety, and “is not intended as a design specification or as an instruction manual.”⁴²⁴

To establish its engineering and design practices, many of which exceed NESC minimum code compliances, ComEd must factor in considerations related to reliability, resiliency, and planning, the safety of all those working on its poles, and the safe and efficient operation of its pole plant as a whole. It is unworkable and unsafe as a practical matter, and thus a very poor engineering and design practice, to design down to minimum code compliance without assessing these numerous other factors that affect the safety, efficiency and reliability of the system.⁴²⁵

At ComEd any poles or other structures which are found to pose an immediate safety hazard are mitigated with immediate resource commitment toward isolation, repair or replacement to remove the hazard. Conditions related to wider infrastructure operation and maintenance are responsibly prioritized, managed and executed.⁴²⁶

Crown Castle 120: *Consequently, to the extent permitted by the NESC, Crown Castle should be permitted to both permanently and temporarily attach wireless nodes and fiber optic lines to red tag poles.*

ComEd Answer: ComEd denies the allegations in this paragraph. Since Crown Castle’s argument relies on the assumption that Rules 214.A.5.a and 214.A.5.b of the 2017 NESC has been adopted in Illinois, and since Crown Castle makes no mention at all of the relevant Rules 214.A.4 and .5 in Illinois, much less provides any analysis of it, Crown

⁴²¹ Osmose Utilities Services, Inc., Wood Pole Services, *Wood Pole Inspection & Life Extension* (Jul. 20, 2019), <https://www.osmose.com/pole-inspection-treatment-maintenance>.

⁴²² There is an exception for treatment in that poles located on school properties, parks, playgrounds, and in wetlands do NOT receive a groundline treatment.

⁴²³ D’Hooge Declaration at ¶12.

⁴²⁴ 2017 NATIONAL ELECTRICAL SAFETY CODE, Rule 010.B. and 010.C. (Apr. 26, 2016); D’Hooge Declaration at ¶27.

⁴²⁵ D’Hooge Declaration at ¶19.

⁴²⁶ *Id.* at ¶6.

Castle's allegations in paragraphs 117-120 are misdirected and uninformed.⁴²⁷

At ComEd any poles or other structures which are found to pose an immediate safety hazard are mitigated with immediate resource commitment toward isolation, repair or replacement to remove the hazard. Conditions related to wider infrastructure operation and maintenance are responsibly prioritized, managed and executed.⁴²⁸

Furthermore, even if the NESC provision Crown Castle relies upon were in effect in Illinois, and even if the unusual loading studies Crown proposes were more precise, it would be inappropriate to require utilities to design and operate their systems in accordance with the minimum standards of the NESC. As explained in the first section of the NESC, the NESC contains "basic provisions" necessary for safety, and "is not intended as a design specification or as an instruction manual."⁴²⁹

To establish its engineering and design practices, many of which exceed NESC minimum code compliances, ComEd must factor in considerations related to reliability, resiliency, and planning, the safety of all those working on its poles, and the safe and efficient operation of its pole plant as a whole. It is unworkable and unsafe as a practical matter, and thus a very poor engineering and design practice, to design down to minimum code compliance without assessing these numerous other factors that affect the safety, efficiency and reliability of the system.⁴³⁰

Finally, there is no such thing as a "temporary attachment" when it comes to load on a pole. The key consideration for purposes of compliance with the NESC and utility standards is what is being attached, not how long it is being attached.⁴³¹

2. Crown Castle Must Pay to Replace or Reinforce "Red Tag" Poles

As explained in ComEd's answers to Paragraphs 121-138 below, the "red tagged" poles that Crown Castle references in this proceeding do not qualify as "red tagged" poles as defined by the Commission in the OTMR Order because they do not violate safety standards. As such, the OTMR Order provisions applicable to "red tagged" poles do not apply.

ComEd is not participating in the modification when Crown Castle replaces a red tagged pole in order to gain access. Instead, capacity is being expanded to accommodate Crown Castle's proposed attachments, so that the pole replacement or reinforcement is being performed for the benefit of Crown Castle, just as it would be for the benefit of any other entity, including ComEd, which might seek to install new facilities on a red tagged pole and must, like Crown Castle, pay the cost of the pole replacement or reinforcement.

⁴²⁷ *Id.* at ¶24.

⁴²⁸ *Id.* at ¶6.

⁴²⁹ 2017 NATIONAL ELECTRICAL SAFETY CODE, Rule 010.B. and 010.C. (Apr. 26, 2016).

⁴³⁰ D'Hooze Declaration at ¶19.

⁴³¹ *Id.* at ¶28.

ComEd's processes with respect to red tagged poles is in accordance with the NESC, not a violation of the NESC. The poles at issue in this proceeding are at full capacity based on ComEd's engineering and reliability standards, which ComEd imposes on all attachers including itself in a nondiscriminatory manner. For new attachments to be accommodated, ComEd must expand capacity by installing a replacement pole (or by reinforcing the existing pole, if appropriate). In most cases, therefore, Crown Castle is asking that the Commission require ComEd to expand capacity to accommodate Crown Castle's attachment requests, which the Commission cannot require utilities to do.

Crown Castle 121: *ComEd's refusal to allow Crown Castle to attach its facilities to "red tagged" poles unless and until Crown Castle assumes the sole financial burden of correcting the preexisting conditions of the pole that Crown Castle did not cause is a denial of access in violation of Section 224 of the Communications Act and an unjust and unreasonable term and condition of attachment.*

ComEd Answer: The "red tagged" poles that Crown Castle references in this proceeding do not qualify as "red tagged" poles as defined by the Commission in footnote 450 of the OTMR Order. The OTMR Order defines a "red tagged" pole as one that is "found to be non-compliant with safety standards."⁴³² But the poles at issue in this proceeding do not violate safety standards as Crown Castle would like the Commission to believe.

Instead, as explained above, in the regular course of business, ComEd performs regular pole inspections. Any pole which upon inspection is found to present a danger to life or property is promptly repaired, disconnected or isolated, in accordance with NESC Rule 214.A.5 in effect in Illinois. Any other pole which upon inspection is found to have deteriorated below original strength by more than 33% is "red tagged" and deemed a "reject pole," consistent with Table 261-1A of the 2002 NESC in effect in Illinois.⁴³³ Poles exhibiting this deterioration or any other defect in the course of inspection are recorded, and such records of defects are maintained until the defects are corrected, in accordance with NESC Rule 214.A.4 in effect in Illinois. This activity is in accordance with the NESC, not a violation of the NESC.⁴³⁴

The Complaint does not demonstrate any NESC violations. Crown cites the 2017 edition of the NESC at Rules 214.A.5.a. and b. which (as explained above) are not in effect in Illinois, but nevertheless ComEd's practices do not violate these provisions anyway. And, as explained above, ComEd's practices also do not violate the 2002 Code Section that actually is in effect in Illinois, but which was not even addressed by the Complaint. ComEd has not failed to replace or reinforce these poles in a timely manner, and so the NESC has not been violated.⁴³⁵

⁴³² OTMR Order at n.450.

⁴³³ 2002 NATIONAL ELECTRICAL SAFETY CODE, Table 261-1A (2001).

⁴³⁴ See Arns Declaration at ¶¶4-5.

⁴³⁵ See *id.* at ¶¶4-5.

Because the poles in this proceeding do not have preexisting safety violations, they are not the same “red tagged” poles defined in the OTMR Order. As a result, the OTMR Order provisions applicable to “red tagged” poles do not apply.

The poles at issue in this proceeding are at full capacity based on ComEd’s engineering and reliability standards, which ComEd imposes on all attachers including itself in a nondiscriminatory manner. For new attachments to be accommodated, ComEd must expand capacity by installing a replacement pole (or by reinforcing the existing pole, if appropriate). In most cases, therefore, Crown Castle is asking that the Commission require ComEd to expand capacity to accommodate Crown Castle’s attachment requests. It has been long established, however, that the Commission cannot require utilities to expand capacity by installing taller poles.

The Pole Attachment Act allows utilities to deny access for lack of capacity:

Notwithstanding paragraph (1), a utility providing electric service may deny a cable television system or any telecommunications carrier access to its poles, ducts, conduits, or rights-of-way, on a non-discriminatory basis where there is insufficient capacity and for reasons of safety, reliability and generally applicable engineering purposes.⁴³⁶

Accordingly, electric utilities need not expand capacity to accommodate attaching entities.⁴³⁷ The Commission agrees. As explained in the April 2011 Pole Attachment Order: “[A]s the court noted in *Southern Company*, mandating the construction of new capacity is beyond the Commission’s authority.”⁴³⁸

The poles at issue in this proceeding that have been “red tagged” for later replacement are poles that the NESC does not require to be replaced right away, as they do not endanger life or property, and have been treated to maintain and extend their present reliable state of service. As such, Crown Castle’s request for a ruling that they be replaced immediately is a rule requiring utilities to expand capacity, which the Pole Attachment Act prohibits. Consistent with the Pole Attachment Act, Crown Castle’s request for capacity expansion should be denied.

⁴³⁶ 47 U.S.C. §224(f)(2) (2010).

⁴³⁷ This determination has been upheld by the 11th Circuit. In *Southern Company v. FCC*, utility petitioners objected to the Commission’s 1999 decision that “utilities must expand pole capacity to accommodate requests for attachment in situations where it is agreed that there is insufficient capacity on a given pole to permit third-party pole attachments.” *Southern Co. v. FCC*, 292 F.3d 1338, 1347 (11th Cir. 2002), quoting *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499 (1996), *aff’d*, Order on Reconsideration, 14 FCC Rcd 18049 (1999). The 11th Circuit held that the plain language of Section 224(f)(2) explicitly prevents the Commission from mandating pole replacements: “When it is agreed that capacity is insufficient, there is no obligation to provide third parties with access to that particular ‘pole, duct, conduit, or right-of-way.’” *Southern Co. v. FCC.*, 292 F.3d 1338, 1347 (11th Cir. 2002). The court further noted that “the FCC’s attempt to mandate capacity expansion is outside of its purview under the plain language of the statute.” *Id.*

⁴³⁸ *April 2011 Pole Attachment Order* at ¶ 95.

Crown Castle 122: *The Commission’s Rules forbid a utility from denying a new attacher access to a pole “based on a preexisting violation not caused by any prior attachments of the new attacher.”*

ComEd Answer: ComEd denies that its red tagged poles have any preexisting violations. Instead, as explained above, in the regular course of business, ComEd performs regular pole inspections. Any pole which upon inspection is found to present a danger to life or property is promptly repaired, disconnected or isolated, in accordance with NESC Rule 214.A.5 in effect in Illinois. Any other pole which upon inspection is found to have deteriorated below original strength by more than 33% is “red tagged” and deemed a “reject pole,” consistent with Table 261-1A of the 2002 NESC in effect in Illinois.⁴³⁹ Poles exhibiting this deterioration or any other defect in the course of inspection are recorded, and such records of defects are maintained until the defects are corrected, in accordance with NESC Rule 214.A.4 in effect in Illinois. This activity is in accordance with the NESC, not a violation of the NESC.⁴⁴⁰

The Complaint does not demonstrate any NESC violations. Crown cites the 2017 edition of the NESC at Rules 214.A.5.a. and b. which (as explained above) are not in effect in Illinois, but nevertheless ComEd’s practices do not violate these provisions anyway. And, as explained above, ComEd’s practices also do not violate the 2002 Code Section that actually is in effect in Illinois, but which was not even addressed by the Complaint. ComEd has not failed to replace or reinforce these poles in a timely manner, and so the NESC has not been violated.⁴⁴¹

Crown Castle 123: *The Commission recently confirmed its long held position that “new attachers are not responsible for the costs associated with bringing poles . . . into compliance with current safety and pole owner construction standards to the extent such poles . . . were out of compliance prior to the new attachment.” In its OTMR Order, the Commission explained:*

Although utilities have sometimes held new attachers responsible for the costs of correcting preexisting violations, this practice is inconsistent with our long-standing principle that a new attacher is responsible only for actual costs incurred to accommodate its attachment. The new attachment may precipitate correction of the preexisting violation, but it is the violation itself that causes the costs, not the new attacher. Holding the new attacher liable for preexisting violations unfairly penalizes the new attacher for problems it did not cause, thereby deterring deployment, and provides incentives for attachers to complete make-ready work irresponsibly and count on later attachers to fix the problem. This is true whether the make-ready work that corrects these preexisting violations is simple or complex.

⁴³⁹ 2002 NATIONAL ELECTRICAL SAFETY CODE, Table 261-1A (2001).

⁴⁴⁰ See Arns Declaration at ¶¶4-5.

⁴⁴¹ See *id.* at ¶¶4-5.

ComEd Answer: ComEd denies that its red tagged poles have any preexisting violations. Instead, as explained above, in the regular course of business, ComEd performs regular pole inspections. Any pole which upon inspection is found to present a danger to life or property is promptly repaired, disconnected or isolated, in accordance with NESC Rule 214.A.5 in effect in Illinois. Any other pole which upon inspection is found to have deteriorated below original strength by more than 33% is “red tagged” and deemed a “reject pole,” consistent with Table 261-1A of the 2002 NESC in effect in Illinois.⁴⁴² Poles exhibiting this deterioration or any other defect in the course of inspection are recorded, and such records of defects are maintained until the defects are corrected, in accordance with NESC Rule 214.A.4 in effect in Illinois. This activity is in accordance with the NESC, not a violation of the NESC.⁴⁴³

The Complaint does not demonstrate any NESC violations. Crown cites the 2017 edition of the NESC at Rules 214.A.5.a. and b. which (as explained above) are not in effect in Illinois, but nevertheless ComEd’s practices do not violate these provisions anyway. And, as explained above, ComEd’s practices also do not violate the 2002 Code Section that actually is in effect in Illinois, but which was not even addressed by the Complaint. ComEd has not failed to replace or reinforce these poles in a timely manner, and so the NESC has not been violated.⁴⁴⁴

Crown Castle 124: *The Commission further clarified that “that utilities may not deny new attachers access to the pole solely based on safety concerns arising from a preexisting violation.” The Commission added that “[t]his includes situations where a pole has been ‘red tagged’—that is, found to be non-complaint with safety standards and placed on a replacement schedule. When a pole has been red tagged, new attachers are not responsible for the cost of pole replacement.”*

ComEd Answer: ComEd denies that its red tagged poles have any preexisting violations. Instead, as explained above, in the regular course of business, ComEd performs regular pole inspections. Any pole which upon inspection is found to present a danger to life or property is promptly repaired, disconnected or isolated, in accordance with NESC Rule 214.A.5 in effect in Illinois. Any other pole which upon inspection is found to have deteriorated below original strength by more than 33% is “red tagged” and deemed a “reject pole,” consistent with Table 261-1A of the 2002 NESC in effect in Illinois.⁴⁴⁵ Poles exhibiting this deterioration or any other defect in the course of inspection are recorded, and such records of defects are maintained until the defects are corrected, in accordance with NESC Rule 214.A.4 in effect in Illinois. This activity is in accordance with the NESC, not a violation of the NESC.⁴⁴⁶

The Complaint does not demonstrate any NESC violations. Crown cites the 2017 edition of the NESC at Rules 214.A.5.a. and b. which (as explained above) are not in effect in

⁴⁴² 2002 NATIONAL ELECTRICAL SAFETY CODE, Table 261-1A (2001).

⁴⁴³ See *id.* at ¶¶4-5.

⁴⁴⁴ See *id.* at ¶¶4-5.

⁴⁴⁵ 2002 NATIONAL ELECTRICAL SAFETY CODE, Table 261-1A (2001).

⁴⁴⁶ See *id.* at ¶¶4-5.

Illinois, but nevertheless ComEd's practices do not violate these provisions anyway. And, as explained above, ComEd's practices also do not violate the 2002 Code Section that actually is in effect in Illinois, but which was not even addressed by the Complaint. ComEd has not failed to replace or reinforce these poles in a timely manner, and so the NESC has not been violated.⁴⁴⁷

Crown Castle 125: *Moreover, the Commission has repeatedly stated that “to the extent the cost of a modification is incurred for the specific benefit of any particular party, the benefiting party will be obligated to assume the cost of the modification, or to bear its proportionate share of cost with all other attaching entities participating in the modification.”*

ComEd Answer: The Commission's statements speak for themselves. These Commission rulings, however, require only the existing attachers participating in the modification to share in the cost. ComEd is not participating in the modification when Crown Castle replaces a red tagged pole in order to gain access. Instead, capacity is being expanded to accommodate Crown Castle's proposed attachments, so that the pole replacement or reinforcement is being performed for the benefit of Crown Castle, just as it would be for the benefit of any other entity, including ComEd, which might seek to install new facilities on a red tagged pole and must, like Crown Castle, pay the cost of the pole replacement or reinforcement.

Crown Castle 126: *Even if ComEd is not considered to be the sole beneficiary, ComEd, at minimum, should share in the costs of the change-out with other existing attaching parties, rather than impose that cost on Crown Castle.*

ComEd Answer: ComEd denies the allegations in this paragraph. Commission rules do not require such an outcome and it is not justified. ComEd is not participating in the modification when Crown Castle replaces a red tagged pole in order to gain access. Instead, capacity is being expanded to accommodate Crown Castle's proposed attachments, so that the pole replacement or reinforcement is being performed for the benefit of Crown Castle, just as it would be for the benefit of any other entity, including ComEd, which might seek to install new facilities on a red tagged pole and must, like Crown Castle, pay the cost of the pole replacement or reinforcement.

Crown Castle 127: *From June 2017 to March 2019, as a condition precedent to attachment, ComEd has required Crown Castle to either replace or reinforce red tag poles for violations that Crown Castle did not cause, while at the same time, ComEd reinforced “red tag” poles for its own benefit.*

ComEd Answer: ComEd denies the allegations in this paragraph. The “red tagged” poles that Crown Castle references in this proceeding do not have preexisting violations and therefore do not qualify as “red tagged” poles as defined by the Commission in footnote 450 of the OTMR Order. The OTMR Order defines a “red tagged” pole as one that is “found to be non-compliant with safety standards.”⁴⁴⁸ The poles at issue in this

⁴⁴⁷ See *id.* at ¶¶4-5.

⁴⁴⁸ OTMR Order at n.450.

proceeding do not violate safety standards as Crown Castle would like the Commission to believe.

Instead, as explained above, in the regular course of business, ComEd performs regular pole inspections. Any pole which upon inspection is found to present a danger to life or property is promptly repaired, disconnected or isolated, in accordance with NESC Rule 214.A.5 in effect in Illinois. Any other pole which upon inspection is found to have deteriorated below original strength by more than 33% is “red tagged” and deemed a “reject pole,” consistent with Table 261-1A of the 2002 NESC in effect in Illinois.⁴⁴⁹ Poles exhibiting this deterioration or any other defect in the course of inspection are recorded, and such records of defects are maintained until the defects are corrected, in accordance with NESC Rule 214.A.4 in effect in Illinois. This activity is in accordance with the NESC, not a violation of the NESC.⁴⁵⁰

The Complaint does not demonstrate any NESC violations. Crown cites the 2017 edition of the NESC at Rules 214.A.5.a. and b. which (as explained above) are not in effect in Illinois, but nevertheless ComEd’s practices do not violate these provisions anyway. And, as explained above, ComEd’s practices also do not violate the 2002 Code Section that actually is in effect in Illinois, but which was not even addressed by the Complaint. ComEd has not failed to replace or reinforce these poles in a timely manner, and so the NESC has not been violated.⁴⁵¹

Because the poles in this proceeding do not have preexisting safety violations, they are not the same “red tagged” poles defined in the OTMR Order. As a result, the OTMR Order provisions applicable to “red tagged” poles do not apply.

The poles at issue in this proceeding are at full capacity based on ComEd’s engineering and reliability standards, which ComEd imposes on all attachers including itself in a nondiscriminatory manner. For new attachments to be accommodated, ComEd must expand capacity by installing a replacement pole (or by reinforcing the existing pole, if appropriate). In most cases, therefore, Crown Castle is asking that the Commission require ComEd to expand capacity to accommodate Crown Castle’s attachment requests. It has been long established, however, that the Commission cannot require utilities to expand capacity by installing taller poles.

The Pole Attachment Act allows utilities to deny access for lack of capacity:

Notwithstanding paragraph (1), a utility providing electric service may deny a cable television system or any telecommunications carrier access to its poles, ducts, conduits, or rights-of-way, on a non-discriminatory basis where there is insufficient capacity and for reasons of safety, reliability and generally applicable engineering purposes.⁴⁵²

⁴⁴⁹ 2002 NATIONAL ELECTRICAL SAFETY CODE, Table 261-1A (2001).

⁴⁵⁰ See Arns Declaration at ¶¶4-5.

⁴⁵¹ See *id.* Declaration at ¶¶4-5.

⁴⁵² 47 U.S.C. §224(f)(2) (2010).

Accordingly, electric utilities need not expand capacity to accommodate attaching entities.⁴⁵³ The Commission agrees. As explained in the April 2011 Pole Attachment Order: “[A]s the court noted in *Southern Company*, mandating the construction of new capacity is beyond the Commission’s authority.”⁴⁵⁴

The poles at issue in this proceeding that have been “red tagged” for later replacement are poles that the NESC does not require to be replaced right away, as they do not endanger life or property, and have been treated to maintain and extend their present reliable state of service. As such, Crown Castle’s request for a ruling that they be replaced immediately is a rule requiring utilities to expand capacity, which the Pole Attachment Act prohibits. Consistent with the Pole Attachment Act, Crown Castle’s request for capacity expansion should be denied.

ComEd admits the allegation that from June 2017 to March 2019, ComEd would permit attachment to “red tag” poles only if Crown Castle replaced the pole, so that ComEd did not give Crown Castle the option to reinforce the poles.

From June 2017 to March 2019, and before, for attachment of its own facilities, ComEd remedied “red tag” poles through reinforcement in some cases rather than pole replacement in every case.⁴⁵⁵

ComEd’s policy was not to allow third parties like Crown Castle to reinforce poles during this same period based on a discretionary judgment. In any event, only a small subset of red-tagged poles might qualify under the same guidelines to be reinforced.⁴⁵⁶

The determination whether to replace or reinforce a pole is a design decision driven by the location of the decay, the size of the decay, the location of risers, the direction of the load, the extent of electric facilities, the height of the banding, whether the pole top is decayed, whether there are woodpecker holes, and dozens of other factors.⁴⁵⁷

It would be inappropriate to require utilities to design and operate their systems in accordance with the minimum standards of the NESC. As explained in the first section

⁴⁵³ This determination has been upheld by the 11th Circuit. In *Southern Company v. FCC*, utility petitioners objected to the Commission’s 1999 decision that “utilities must expand pole capacity to accommodate requests for attachment in situations where it is agreed that there is insufficient capacity on a given pole to permit third-party pole attachments.” *Southern Co. v. FCC*, 292 F.3d 1338, 1347 (11th Cir. 2002), quoting *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499 (1996), *aff’d*, Order on Reconsideration, 14 FCC Rcd 18049 (1999). The 11th Circuit held that the plain language of Section 224(f)(2) explicitly prevents the Commission from mandating pole replacements: “When it is agreed that capacity is insufficient, there is no obligation to provide third parties with access to that particular ‘pole, duct, conduit, or right-of-way.’” *Southern Co. v. FCC*, 292 F.3d 1338, 1347 (11th Cir. 2002). The court further noted that “the FCC’s attempt to mandate capacity expansion is outside of its purview under the plain language of the statute.” *Id.*

⁴⁵⁴ *April 2011 Pole Attachment Order* at ¶ 95.

⁴⁵⁵ Arns Declaration at ¶16.

⁴⁵⁶ *Id.* at ¶17.

⁴⁵⁷ *Id.* at ¶5.

of the NESC, the NESC contains “basic provisions” necessary for safety, and “is not intended as a design specification or as an instruction manual.”⁴⁵⁸

Crown Castle 128: *The Commission addressed a similar dispute in Kansas City Cable Partners v. Kansas City Power & Light Co.*

ComEd Answer: ComEd denies that this is a dispute similar to the dispute in *Kansas City Cable Partners v. Kansas City Power & Light Co.*, because for the reasons explained above the poles at issue in this proceeding do not have preexisting violations.

Crown Castle 129: *In Kansas City Cable, Kansas City Power & Light (“KCPL”) required Time Warner Cable (“TWC”) to replace poles prior to attachment.*

ComEd Answer: ComEd denies that this is a dispute similar to the dispute in *Kansas City Cable Partners v. Kansas City Power & Light Co.*, because for the reasons explained above the poles at issue in this proceeding do not have preexisting violations.

Crown Castle 130: *TWC learned that a number of poles “that KCPL identified as needing replacement . . . either would meet NESC guidelines or were in need of replacement before additional attachments would be added.”*

ComEd Answer: ComEd denies that this is a dispute similar to the dispute in *Kansas City Cable Partners v. Kansas City Power & Light Co.*, because for the reasons explained above the poles at issue in this proceeding do not have preexisting violations.

Crown Castle 131: *TWC asked KCPL for “sufficient backup information so that [TWC] can understand the basis” for requiring pole replacement.*

ComEd Answer: ComEd denies that this is a dispute similar to the dispute in *Kansas City Cable Partners v. Kansas City Power & Light Co.*, because for the reasons explained above the poles at issue in this proceeding do not have preexisting violations.

Crown Castle 132: *Time Warner subsequently filed a complaint with the Commission, alleging that KCPL’s pole replacement practice constituted an effective denial of access and requesting the Commission to “order KCPL to immediately grant access to all poles that do not need replacement or to which attachment can be made temporarily, pending replacement, without causing a safety hazard.”*

ComEd Answer: ComEd denies that this is a dispute similar to the dispute in *Kansas City Cable Partners v. Kansas City Power & Light Co.*, because for the reasons explained above the poles at issue in this proceeding do not have preexisting violations.

Crown Castle 133: *The Commission ordered KCPL to, within 7 days of the release of its Order, immediately commence all pole changeout and make-ready work and asserted that KCPL was responsible for all corrections of preexisting violations:*

⁴⁵⁸ 2017 National Electrical Safety Code, Rule 010.B. and 010.C. (Apr. 26, 2016).

It appears that a number of poles that need replacement violate NESC requirements prior to attachment by Time Warner and the violation of the NESC would not be caused by Time Warner's facilities. Correction of the pre-existing code violation is reasonably the responsibility of KCPL and only additional expenses incurred to accommodate Time Warner's attachment to keep the pole within NESC standards should be borne by Time Warner.

ComEd Answer: ComEd denies that this is a dispute similar to the dispute in *Kansas City Cable Partners v. Kansas City Power & Light Co.*, because for the reasons explained above the poles at issue in this proceeding do not have preexisting violations.

Crown Castle 134: *The dispute here resembles the dispute in Kansas City Cable.*

ComEd Answer: ComEd denies that this is a dispute similar to the dispute in *Kansas City Cable Partners v. Kansas City Power & Light Co.*, because for the reasons explained above the poles at issue in this proceeding do not have preexisting violations.

Crown Castle 135: *Like TWC, Crown Castle lacks adequate data and explanation to understand the pole owner's basis for requiring pole replacements and needs immediate access to complete its ongoing projects.*

ComEd Answer: ComEd denies that this is a dispute similar to the dispute in *Kansas City Cable Partners v. Kansas City Power & Light Co.*, because for the reasons explained above the poles at issue in this proceeding do not have preexisting violations.

Crown Castle 136: *ComEd, similar to KCPL, prohibits deployment of facilities unless and until Crown Castle replaces poles for defects that it did not cause.*

ComEd Answer: ComEd denies that this is a dispute similar to the dispute in *Kansas City Cable Partners v. Kansas City Power & Light Co.*, because for the reasons explained above the poles at issue in this proceeding do not have preexisting violations.

Crown Castle 137: *Notwithstanding ComEd's lack of transparency and candor, it is clear that the "red tag" status of ComEd poles is wholly unrelated to Crown Castle's proposed attachments and such replacements primarily, if not solely, benefit ComEd.*

ComEd Answer: ComEd denies that it has not been transparent and candid. In addition, because Crown Castle can access red tagged poles prior to the end of the useful life of those poles, and because capacity is being expanded to accommodate Crown Castle's proposed attachments, the pole replacement is primarily for the benefit of Crown Castle, just as it would be for the benefit of any other entity, including ComEd, which might seek to install new facilities on a red tagged pole and must, like Crown Castle, pay the cost of the pole replacement or reinforcement.

Crown Castle 138: *Therefore, Crown Castle should not be responsible for such costs and ComEd, pursuant to the Commission's Rules, should refund Crown Castle \$14,482,307, plus interest (or such amount as is appropriate at the end of this dispute), for payments to correct, replace, or reinforce red tagged poles.*

ComEd Answer: Crown Castle mistakenly relies on the OTMR Order's red tagged pole rulings to justify its refund request. As explained, the OTMR Order's red tagged pole rulings do not apply to the poles at issue in this proceeding. The "red tagged" poles that Crown Castle references in this proceeding do not qualify as "red tagged" poles as defined by the Commission in footnote 450 of the OTMR Order. The OTMR Order defines a "red tagged" pole as one that is "found to be non-compliant with safety standards."⁴⁵⁹ But the poles at issue in this proceeding do not violate safety standards as Crown Castle would like the Commission to believe.

Instead, as explained above, in the regular course of business, ComEd performs regular pole inspections. Any pole which upon inspection is found to present a danger to life or property is promptly repaired, disconnected or isolated, in accordance with NESC Rule 214.A.5 in effect in Illinois. Any other pole which upon inspection is found to have deteriorated below original strength by more than 33% is "red tagged" and deemed a "reject pole," consistent with Table 261-1A of the 2002 NESC in effect in Illinois.⁴⁶⁰ Poles exhibiting this deterioration or any other defect in the course of inspection are recorded, and such records of defects are maintained until the defects are corrected, in accordance with NESC Rule 214.A.4 in effect in Illinois. This activity is in accordance with the NESC, not a violation of the NESC.⁴⁶¹

The Complaint does not demonstrate any NESC violations. Crown cites the 2017 edition of the NESC at Rules 214.A.5.a. and b. which (as explained above) are not in effect in Illinois, but nevertheless ComEd's practices do not violate these provisions anyway. And, as explained above, ComEd's practices also do not violate the 2002 Code Section that actually is in effect in Illinois, but which was not even addressed by the Complaint. ComEd has not failed to replace or reinforce these poles in a timely manner, and so the NESC has not been violated.⁴⁶²

Because the poles in this proceeding do not have preexisting safety violations, they are not the same "red tagged" poles defined in the OTMR Order. As a result, the OTMR Order provisions applicable to "red tagged" poles do not apply.

Even if the poles at issue in this proceeding qualified as "red tagged" poles as defined by the OTMR Order, those new rulings in the OTMR Order should not be applied retroactively for the reasons explained in ComEd's Affirmative Defenses., and ComEd cannot be held liable for refunds on that basis. Further, as explained in ComEd's

⁴⁵⁹ OTMR Order at n.450.

⁴⁶⁰ 2002 NATIONAL ELECTRICAL SAFETY CODE, Table 261-1A (2001).

⁴⁶¹ See Arns Declaration at ¶¶4-5.

⁴⁶² See *id.* at ¶¶4-5.

Affirmative Defenses, even if ComEd were liable for refunds, any refund liability must be limited by going back no further than the July 15 Bureau Order when the FCC decided it had jurisdiction. In any event, as also explained in ComEd's Affirmative Defenses, refund liability can go back no further than the applicable statute of limitations, which is two years.

3. ComEd Has Provided Crown Castle Sufficient Information Regarding its "Red Tag" Practice

As explained in ComEd's answers to Paragraphs 139-145 below, a detailed, accurate description of ComEd's program can be quite complicated with lots of variants and different inspection methods, and depends on a long list of miscellaneous information. It should also be noted that ComEd's pole inspections are currently outsourced to Osmose Utility Services, Inc., using Osmose load calculation software and using Osmose pole treatment services. This is the company with which Crown Castle's expert Mr. Bingel was employed for 30 years. ComEd's specification for pole maintenance services is shared with its pole co-owners, sister companies, and its service provider. Beyond that, these are treated as internal proprietary documents.

FCC make-ready deadlines and other rules have applied to Crown Castle's attachments to ComEd's poles in Illinois. The July 15 Bureau Order ruled that the FCC had jurisdiction over this Complaint, which has now caused ComEd to reexamine the applicability of FCC make-ready deadlines and other rules. Prior to that time, ComEd (and indeed Crown Castle) operated consistent with ICC jurisdiction, recognizing the ICC had jurisdiction.

Crown Castle 139: *ComEd's concealment of criteria and data used to determine whether a pole is "red tagged" is a violation of Section 224(e) of the Communications Act, which requires that all rates, terms and condition of attachment to be "just and reasonable."*

ComEd Answer: ComEd denies that it concealed any criteria or data used to determine whether a pole is "red tagged." Paragraph 139 of the Complaint contains legal conclusions to which no response is required. To the extent a response is required, the allegations of Paragraph 139 are denied.

Crown Castle 140: *In Knology, Inc. v. Georgia Power, Georgia Power "refused to itemize, describe, or otherwise provide clarifying information that would assist Knology in identifying the basis for make-ready charge."*

ComEd Answer: This paragraph includes legal conclusions to which no response is required.

Crown Castle 141: *In response, Knology, a cable operator, filed a pole attachment complaint with the Commission, asserting that the utility's refusal to provide detailed information regarding make-ready charges was an unjust and unreasonable term and condition of attachment in violation of Section 224.*

ComEd Answer: This paragraph includes legal conclusions to which no response is required.

Crown Castle 142: *The Commission agreed with the attaching party and ordered the utility to “to provide reasonable billing back-up information in the future consistent with” the findings in the Commission’s Order.*

ComEd Answer: This paragraph includes legal conclusions to which no response is required.

Crown Castle 143: *In reaching its holding, the Commission explained that the utility “had an obligation to provide a reasonable amount of information sufficient to substantiate its make-ready charges.”*

ComEd Answer: This paragraph includes legal conclusions to which no response is required.

Crown Castle 144: *As discussed above, ComEd is not permitted to charge Crown Castle anything for replacement or reinforcement of red tagged poles. However, even if there were some basis for ComEd to charge Crown Castle, ComEd clearly has not met this obligation as it has not provided any “information sufficient to substantiate” its “red tag” pole replacement costs.*

ComEd Answer: Paragraph 144 of the Complaint contains legal conclusions to which no response is required. To the extent a response is required, the allegations of Paragraph 144 are denied.

Crown Castle 145: *Consequently, at a minimum, the Commission should order ComEd to fulfill its responsibility under the Communications Act by providing Crown Castle access to any and all information that substantiate replacement and reinforcement for “red tag” poles.*

ComEd Answer: ComEd denies that it is obligated by the Communications Act to provide Crown Castle any and all information to explain its red tag process. ComEd cannot recall whether Crown Castle has requested such information or whether ComEd has orally provided at least a general description of the criteria used for designating poles as priority/non-priority or restorable/replacement. A detailed, accurate description of ComEd’s program can be quite complicated with lots of variants and different inspection methods, and depends on information such as wood species, original treatment type, setting medium, accessibility, presence of other underground facilities, pole height, electric capacity, effective circumference, pole defects (e.g., splits, woodpecker holes, cracks), service attachments, the impact on electric distribution customers, and other factors. It should also be noted that ComEd’s pole inspections are currently outsourced to Osmose Utility Services, Inc., using Osmose load calculation software and using Osmose pole treatment services. This is the company with which Crown Castle’s expert Mr. Bingel was employed for 30 years.

ComEd's specification for pole maintenance services is shared with its pole co-owners, sister companies, and its service provider. Beyond that, these are treated as internal proprietary documents.⁴⁶³

ComEd denies that the "red tag" poles that Crown Castle references in this proceeding qualify as "red tagged" poles as defined by the Commission in footnote 450 of the OTMR Order. The OTMR Order defines a "red tagged" pole as one that is "found to be non-compliant with safety standards."⁴⁶⁴ The poles at issue in this proceeding do not violate safety standards.

ComEd also denies that it has been subject to FCC regulations or requirements under the Communications Act. For the reasons explained in ComEd's Affirmative Defenses, ComEd denies that FCC make-ready deadlines and other rules have applied to Crown Castle's attachments to ComEd's poles in Illinois. The July 15 Bureau Order ruled that the FCC had jurisdiction over this Complaint, which has now caused ComEd to reexamine the applicability of FCC make-ready deadlines and other rules. Prior to that time, ComEd (and indeed Crown Castle) operated consistent with ICC jurisdiction, recognizing the ICC had jurisdiction.

4. ComEd Has Not Unreasonably Delayed Pre-Construction Surveys or Issuance of Make-Ready Estimates

As explained in ComEd's answers to Paragraphs 146-165 below, FCC make-ready deadlines and other rules have applied to Crown Castle's attachments to ComEd's poles in Illinois. The July 15 Bureau Order ruled that the FCC had jurisdiction over this Complaint, which has now caused ComEd to reexamine the applicability of FCC make-ready deadlines and other rules. Prior to that time, ComEd (and indeed Crown Castle) operated consistent with ICC jurisdiction, recognizing the ICC had jurisdiction. Regardless, ComEd believes it has timely processed Crown Castle's application for pole attachments given ComEd's considerable constraints. Crown Castles example of only three poles being replaced in a four-day period is a bald mischaracterization of ComEd's efforts.

Crown Castle 146: *ComEd's failure to process pole attachment applications in accordance with the Commission's timelines prescribed in 47 C.F.R. § 1.1411 constitutes an effective denial of access in violation of 47 U.S.C. § 224.*

ComEd Answer: Paragraph 146 of the Complaint contains legal conclusions to which no response is required. To the extent a response is required, the allegations of Paragraph 146 are denied.

Crown Castle 147: *Under the Commission's rules, a utility is required to complete pre-*

⁴⁶³ D'Hooe Declaration at ¶7.

⁴⁶⁴ OTMR Order at n.450.

construction surveys for larger orders within 60 days of receipt of a complete application to attach facilities to its utility poles.

ComEd Answer: Commission rules speak for themselves. To the extent a response is required, the allegations of Paragraph 147 are denied.

Crown Castle 148: *A utility is also required to present new attachers a detailed, itemized make-ready estimate within 14 days of completing a pre-construction survey.*

ComEd Answer: Commission rules speak for themselves. To the extent a response is required, the allegations of Paragraph 148 are denied.

Crown Castle 149: *Therefore, a utility must complete a pre-construction survey and issue a make-ready estimate for both fiber and wireless application for large orders within 74 days of receipt of a complete pole attachment application.*

ComEd Answer: Commission rules speak for themselves. To the extent a response is required, the allegations of Paragraph 149 are denied.

Crown Castle 150: *For large orders of fiber attachments within the communications space, a utility must take final action within 193 days of attachment of receipt of pole attachment application. For large orders of wireless attachments above the communications space, a utility must take final action within 223 days of attachment of receipt of pole attachment application.*

ComEd Answer: Commission rules speak for themselves. To the extent a response is required, the allegations of Paragraph 150 are denied.

Crown Castle 151: *Although Crown Castle does not believe its applications constitute “large orders,” even if the Commission assumes for purposes of this Complaint that the timeframes for large orders apply, ComEd still has failed to comply with the Commission’s timelines.*

ComEd Answer: For the reasons explained in ComEd’s Affirmative Defenses, ComEd denies that FCC make-ready deadlines and other rules have applied to Crown Castle’s attachments to ComEd’s poles in Illinois. The July 15 Bureau Order ruled that the FCC had jurisdiction over this Complaint, which has now caused ComEd to reexamine the applicability of FCC make-ready deadlines and other rules. Prior to that time, ComEd (and indeed Crown Castle) operated consistent with ICC jurisdiction, recognizing the ICC had jurisdiction.

Crown Castle 152: *As discussed above, Crown Castle has been waiting well over 60 days for pre-construction surveys for 114 pending wireless attachment applications and 41 pending fiber attachment applications.*

ComEd Answer: ComEd denies the allegations in this paragraph for the reasons stated in its response to Paragraph 93.

Crown Castle 153: *ComEd has also failed to issue make ready estimates for 378 wireless applications and 446 fiber applications (covering 5,649 poles for fiber and wireless attachments) within the required 74 days.*

ComEd Answer: ComEd denies the allegations in this paragraph for the reasons stated in its responses to paragraphs 86 and 94.

Crown Castle 154: *What is most concerning is that ComEd has failed to take final action on 254 wireless applications within the 223-day timeframe and 579 fiber applications (covering 6,955 poles for fiber and wireless attachments) within the 193-day timeframe.*

ComEd Answer: ComEd denies the allegations in this paragraph for the reasons stated in its responses to paragraphs 88 and 96.

Crown Castle 155: *The Commission has noted that the lack of a timeline can cause “excessive delays” and that “having timeline offers certainty to attachers and allows them to make concrete business plans.”*

ComEd Answer: Commission orders speak for themselves. To the extent a response is required, the allegations of Paragraph 155 are denied.

Crown Castle 156: *In other words, the Commission’s timelines are designed to combat the exact issues created by ComEd’s delay.*

ComEd Answer: Commission rules speak for themselves. To the extent a response is required, the allegations of Paragraph 156 are denied.

Crown Castle 157: *ComEd’s disregard of for the Commission’s pole attachment timeframes has disrupted Crown Castle’s business operations and jeopardized Crown Castle’s relationships with its customers.*

ComEd Answer: ComEd denies the allegations in this paragraph. ComEd has not disregarded the Commission’s pole attachment timeframes but has recognized they do not apply since the FCC has no jurisdiction. ComEd lacks knowledge or information sufficient to form a belief as to their truth of the remainder of this paragraph.

Crown Castle 158: *Crown Castle, in most cases, cannot take advantage of the Commission’s one-touch make-ready rules, which only apply to “simple” make-ready. Most of Crown Castle’s attachments require “complex” make-ready.*

ComEd Answer: ComEd denies the allegations for lack of knowledge or information sufficient to form a belief as to their truth.

Crown Castle 159: *However, Crown Castle has made and continues to make great efforts to work with ComEd in resolving the application processing delays.*

ComEd Answer: ComEd denies the characterization of application processing delays, which presupposes FCC make-ready deadlines were in effect. For the reasons explained in ComEd’s Affirmative Defenses, ComEd denies that FCC make-ready deadlines and other rules have applied to Crown Castle’s attachments to ComEd’s poles in Illinois. The July 15 Bureau Order ruled that the FCC had jurisdiction over this Complaint, which has now caused ComEd to reexamine the applicability of FCC make-ready deadlines and other rules. Prior to that time, ComEd (and indeed Crown Castle) operated consistent with ICC jurisdiction, recognizing the ICC had jurisdiction.

ComEd believes it has timely processed Crown Castle’s application for pole attachments given ComEd’s considerable constraints.⁴⁶⁵ In 2018, ComEd utilized ■■■ full time equivalent employees for back office third party attachment support. In early 2019, it progressed to ■■■ full time equivalent employees, and is now at ■■■ full time equivalent employees for July. With increased resources and favorable weather for make ready work, May-June completions were 300% higher for Crown Castle than the first four months of 2019. Additionally, ComEd proactively reached out to multiple contractors to solicit additional resources and offered overtime for its internal workforce as well as the contractors.⁴⁶⁶

ComEd denies that Crown Castle has made “great efforts” to work with ComEd. For example, as explained in ComEd’s response to Paragraphs 76 and 77, Crown Castle provided forecasts of future activity but these forecasts were inaccurate and unreliable, and therefore could not be used by ComEd from planning perspective. Also, the weekly meetings held with Crown Castle to discuss operational issues and prioritize attachments were similar to ComEd’s meetings with other attachers. At these weekly meetings, Crown Castle took the opportunity to reprioritize more recent applications over older applications, consistent with ComEd’s continuing efforts to collaborate with Crown Castle. The reprioritization requested by Crown Castle had the effect of delaying ComEd’s responses to other pending aged applications.

Crown Castle 160: *Crown Castle has met with ComEd on at least 29 occasions to address this matter since 2018.*

ComEd Answer: ComEd denies the allegations in this paragraph for the reasons stated in its response to Paragraph 78.

Crown Castle 161: *In at least one attempt to resolve the delays, Crown Castle has proposed a “turnkey” solution, which would allow Crown Castle to hire, control, and direct ComEd-approved third party contractors to perform pre-construction surveys and complete make-ready estimates. ComEd denied this proposal, refusing to allow Crown Castle to hire or control contractors, despite the fact that such “self-help” is permitted under the Commission’s Rules.*

ComEd Answer: ComEd denies the allegations in this paragraph because they are based on inadmissible hearsay evidence.

⁴⁶⁵ Mann Declaration at ¶8.

⁴⁶⁶ *Id.* at ¶16.

Crown Castle requested that ComEd approve Thayer Power & Communication to conduct self-help complex and above the communications space make-ready and simple make-ready.⁴⁶⁷ By letter dated May 30, 2019, ComEd asked Crown Castle for proof that Thayer was an approved contractor, but Crown Castle never responded.⁴⁶⁸ ComEd also explained that FCC regulations do not apply, contrary to Crown Castle's contention.⁴⁶⁹

For the reasons explained in ComEd's Affirmative Defenses, ComEd denies that FCC make-ready deadlines and other rules have applied to Crown Castle's attachments to ComEd's poles in Illinois. The July 15 Bureau Order ruled that the FCC had jurisdiction over this Complaint, which has now caused ComEd to reexamine the applicability of FCC make-ready deadlines and other rules. Prior to that time, ComEd (and indeed Crown Castle) operated consistent with ICC jurisdiction, recognizing the ICC had jurisdiction.

Crown Castle 162: *Crown Castle also asked ComEd to expand its list of authorized contractors to perform make-ready, but ComEd has yet to approve or deny Crown Castle's request.*

ComEd Answer: As explained above, ComEd has not approved Thayer as a contractor because ComEd has a process to qualify contractors and Thayer has not gone through that process. Thayer is not a contractor of choice and despite Crown Castle's representation that Thayer was an approved vendor, ComEd's records reflect no such arrangement.

By letter dated May 30, 2019, ComEd asked Crown Castle for proof that Thayer was an approved contractor, but Crown Castle never responded.⁴⁷⁰ ComEd also explained that FCC regulations do not apply, contrary to Crown Castle's contention.⁴⁷¹

Crown Castle 163: *Under 47 C.F.R. §1.1412, new attachers, for both simple make-ready and complex make-ready above the communications space, "may request the addition to the list of any contractor that meets the minimum qualifications" listed in 47 C.F.R. §1.1412(c)(1)-(5) and "the utility may not unreasonably withhold its consent."*

ComEd Answer: This paragraph contains legal conclusions to which no response is required.

Crown Castle 164: *Pursuant to 47 C.F.R. §1.1412, on May 28, 2019, Crown Castle, requested*

⁴⁶⁷ Letter from Maureen A. Whitfield, Manager of Utility Relations, Crown Castle Fiber LLC, to Mark A. Falcone, Vice President of Support Services, Commonwealth Edison Company (May 28, 2019), attached to Crown Castle Pole Attachment Complaint at Attachment D, Exhibit 14 (CCF000301-CCF000302).

⁴⁶⁸ May 30 Falcone Letter.

⁴⁶⁹ *Id.*; see also Letter from Bradley R. Perkins, Assistant General Counsel – Regulatory, Commonwealth Edison Company, to Maureen A. Whitfield, Manager of Utility Relations, Crown Castle Fiber LLC (June 12, 2019), attached to Crown Castle Pole Attachment Complaint at Attachment D, Exhibit 15 (CCF000304-CCF000305).

⁴⁷⁰ May 30 Falcone Letter.

⁴⁷¹ *Id.*; see also Letter from Bradley R. Perkins, Assistant General Counsel – Regulatory, Commonwealth Edison Company, to Maureen A. Whitfield, Manager of Utility Relations, Crown Castle Fiber LLC (June 12, 2019), attached to Crown Castle Pole Attachment Complaint at Attachment D, Exhibit 15 (CCF000304-CCF000305).

ComEd to approve Thayer Power & Communication to conduct self-help complex and above the communications space make-ready and simple make-ready. To help alleviate these roadblocks to deployment, the Commission should order ComEd to allow Crown Castle to hire, direct, and control ComEd-approved third-party contractors to complete survey and make ready work at the direction of Crown Castle. In addition, the Commission should order ComEd to approve Thayer Power & Communication as an authorized contractor to perform complex above the communication space and simple make-ready.

ComEd Answer: ComEd admits that Crown Castle requested that ComEd approve Thayer Power & Communication to conduct self-help complex and above the communications space make-ready and simple make-ready, but denies the remainder of the allegations in this paragraph.

ComEd has not approved Thayer as a contractor because ComEd has a process to qualify contractors and Thayer has not gone through that process. Thayer is not a contractor of choice and despite Crown Castle's representation that Thayer was an approved vendor, ComEd's records reflect no such arrangement.

By letter dated May 30, 2019, ComEd asked Crown Castle for proof that Thayer was an approved contractor, but Crown Castle never responded.⁴⁷² ComEd also asked Crown Castle for proof that Thayer met the five criteria Crown Castle cited, but Crown Castle never responded to that request either.⁴⁷³ ComEd also explained that FCC regulations do not apply, contrary to Crown Castle's contention.⁴⁷⁴

For the reasons explained in ComEd's Affirmative Defenses, ComEd denies that FCC make-ready deadlines and other rules have applied to Crown Castle's attachments to ComEd's poles in Illinois. The July 15 Bureau Order ruled that the FCC had jurisdiction over this Complaint, which has now caused ComEd to reexamine the applicability of FCC make-ready deadlines and other rules. Prior to that time, ComEd (and indeed Crown Castle) operated consistent with ICC jurisdiction, recognizing the ICC had jurisdiction.

Crown Castle 165: *Permitting Crown Castle to direct and control third-party contractors is the only viable solution for curing these delays. An order compelling ComEd to meet the Commission's timeframes will not suffice because ComEd has demonstrated that it cannot efficiently manage its field crews. For example, from May 27, 2019 to May 30, 2019, despite having fifteen (15) ComEd field crews working, ComEd was only able to change out three (3) poles for the Crown Castle deployment. Therefore, Crown Castle requires the ability to manage third-party contractors in order to successfully and timely complete its deployment projects in Illinois.*

⁴⁷² May 30 Falcone Letter.

⁴⁷³ *Id.*

⁴⁷⁴ *Id.*; see also Letter from Bradley R. Perkins, Assistant General Counsel – Regulatory, Commonwealth Edison Company, to Maureen A. Whitfield, Manager of Utility Relations, Crown Castle Fiber LLC (June 12, 2019), attached to Crown Castle Pole Attachment Complaint at Attachment D, Exhibit 15 (CCF000304-CCF000305).

ComEd Answer: ComEd admits that from May 27-30, 2019, ComEd replaced three poles for Crown Castle. But ComEd's records also show that from May 28-June 1, 2019, ComEd replaced 21 poles for Crown Castle. No one worked on May 27 because it was Memorial Day. And ComEd made up for it by hiring crews to work overtime on Saturday, June 1.⁴⁷⁵

Allowing Crown Castle to direct and control third party contractors would be an inappropriate draconian solution considering that the parties only recently learned that the FCC is asserting jurisdiction. Prior to the July 15 Bureau Order, the assumption was FCC make-ready deadlines do not apply. At the very least, the FCC should give the parties time to allow ComEd and Crown Castle to work collaboratively to accommodate Crown Castle's facilities, and revisit the situation in twelve months.⁴⁷⁶

F. ATTEMPTS TO RESOLVE ALL DISPUTES

As explained in ComEd's answers to Paragraphs 166-175 below, at the parties' weekly meetings, Crown Castle took the opportunity to reprioritize more recent applications over older applications, consistent with ComEd's continuing efforts to collaborate with Crown Castle. The reprioritization requested by Crown Castle had the effect of delaying ComEd's responses to other pending aged applications.

FCC make-ready deadlines and other rules have applied to Crown Castle's attachments to ComEd's poles in Illinois. The July 15 Bureau Order ruled that the FCC had jurisdiction over this Complaint, which has now caused ComEd to reexamine the applicability of FCC make-ready deadlines and other rules. Prior to that time, ComEd (and indeed Crown Castle) operated consistent with ICC jurisdiction, recognizing the ICC had jurisdiction.

Crown Castle 166: *Pursuant to Section 1.722(g) of the Commission's Rules, Crown Castle has engaged in good faith attempts to resolve the dispute regarding ComEd's "red tag" requirements and failure to act in a timely manner.*

ComEd Answer: ComEd denies the allegations for lack of knowledge or information sufficient to form a belief as to their truth.

Crown Castle 167: *As a threshold matter, Crown Castle has engaged in many meetings and communications with ComEd in an attempt to address the various red tag and delay related issues involved in the project. For example, Crown Castle and ComEd have a "director level" meeting on the project once per week.*

ComEd Answer: ComEd denies that all of these meetings were an attempt to remedy delays. Instead, these meetings included weekly meetings to discuss operational issues and prioritize attachments, similar to ComEd's meetings with other attachers. At these

⁴⁷⁵ Herrera Declaration at ¶31.

⁴⁷⁶ *Id.* at ¶32.

weekly meetings, Crown Castle took the opportunity to reprioritize more recent applications over older applications, consistent with ComEd's continuing efforts to collaborate with Crown Castle. The reprioritization requested by Crown Castle had the effect of delaying ComEd's responses to other pending aged applications.

Crown Castle 168: *Pursuant to the Commission's Rules, on October 25, 2018, Mr. Brian Cabe of Crown Castle of sent a letter to Mr. Vito Martino of ComEd, requesting a final executive level negotiation before November 6, 2018 to resolve the ongoing disputes between Crown Castle and ComEd related to ComEd's red tagging practice and unlawful pole attachment rates.*

ComEd Answer: ComEd admits that such a letter was sent. ComEd denies that ComEd's pole attachment rates are unlawful.

Crown Castle 169: *On December 4, 2019, Crown Castle and ComEd held an executive-level meeting at ComEd's office located at 2 Lincoln Centre, Oakbrook Terrace, IL 60181.*

ComEd Answer: ComEd admits the allegations in Paragraph 169 of the Complaint, except that the meeting took place on December 4, 2018.

Crown Castle 170: *At the executive-level meeting, the parties agreed to schedule a follow-up meeting for December 14, 2018, to further discuss the "red tag" issue.*

ComEd Answer: ComEd admits the allegations in Paragraph 170 of the Complaint.

Crown Castle 171: *During the follow-up call on December 14, 2018, parties agreed to form two "sub-teams" comprised of operational representatives from both Crown Castle and ComEd to specifically focus on resolving the red tag issue and pole attachment rates.*

ComEd Answer: ComEd admits the allegations in Paragraph 171 of the Complaint.

Crown Castle 172: *Since the follow-up meeting on December 14, 2018, Crown Castle and ComEd have had nine (9) subsequent meetings (four (4) executive meetings and five (5) sub-team meetings) to address the red tag issue. Despite the many meetings, as set forth above, ComEd continues its unlawful practices, and the Parties' dispute is unresolved.*

ComEd Answer: ComEd denies that all of these meetings were an attempt to remedy delays. Instead, these meetings included weekly meetings to discuss operational issues and prioritize attachments, similar to ComEd's meetings with other attachers. At these weekly meetings, Crown Castle took the opportunity to reprioritize more recent applications over older applications, consistent with ComEd's continuing efforts to collaborate with Crown Castle. The reprioritization requested by Crown Castle had the effect of delaying ComEd's responses to other pending aged applications.

Crown Castle 173: *On April 26, 2019, Ms. Karen Rohrkemper of Crown Castle sent a letter to Mr. Vito Martino requesting final executive level negotiation before May 3, 2019 to resolve ongoing disputes related to ComEd's failure to complete pre-construction surveys and issue*

make-ready estimates in accordance's with the Commission's prescribed timelines.

ComEd Answer: ComEd admits that such a letter was sent. For the reasons explained in ComEd's Affirmative Defenses, ComEd denies that FCC make-ready deadlines and other rules have applied to Crown Castle's attachments to ComEd's poles in Illinois. The July 15 Bureau Order ruled that the FCC had jurisdiction over this Complaint, which has now caused ComEd to reexamine the applicability of FCC make-ready deadlines and other rules. Prior to that time, ComEd (and indeed Crown Castle) operated consistent with ICC jurisdiction, recognizing the ICC had jurisdiction.

Crown Castle 174: *An executive-level meeting was held on May 13, 2019 at Crown Castle's office located at 947 Parkview Boulevard, Lombard, Illinois. In addition to discussing application delays, Crown Castle requested executive-level intervention from ComEd to cease the new policy of prohibiting temporary attachments.*

ComEd Answer: ComEd admits that such a meeting took place.

ComEd denies the characterization of application delays, which presupposes FCC make-ready deadlines were in effect. For the reasons explained in ComEd's Affirmative Defenses, ComEd denies that FCC make-ready deadlines and other rules have applied to Crown Castle's attachments to ComEd's poles in Illinois. The July 15 Bureau Order ruled that the FCC had jurisdiction over this Complaint, which has now caused ComEd to reexamine the applicability of FCC make-ready deadlines and other rules. Prior to that time, ComEd (and indeed Crown Castle) operated consistent with ICC jurisdiction, recognizing the ICC had jurisdiction.

ComEd believes it has timely processed Crown Castle's application for pole attachments given ComEd's considerable constraints.⁴⁷⁷ In 2018, ComEd utilized [REDACTED] full time equivalent employees for back office third party attachment support. In early 2019, it progressed to [REDACTED] full time equivalent employees, and is now at [REDACTED] full time equivalent employees for July. With increased resources and favorable weather for make ready work, May-June completions were 300% higher for Crown Castle than the first four months of 2019. Additionally, ComEd proactively reached out to multiple contractors to solicit additional resources and offered overtime for its internal workforce as well as the contractors.⁴⁷⁸

ComEd denies there was any "new policy of prohibiting temporary attachments." Until May 2019, ComEd had allowed Crown Castle to install temporary attachments on some red-tagged poles on a case-by-case basis, but ComEd still required Crown Castle to replace the pole. This practice was inconsistent with the company design standard requirement and resultant from a human performance element the company is following up on internally. In May 2019, ComEd's Distribution Standards department was asked to review this practice and from that time forward disallowed the practice because no one on ComEd's system, including ComEd, is allowed to install new temporary attachments on

⁴⁷⁷ Mann Declaration at ¶8.

⁴⁷⁸ *Id.* at ¶16.

red-tagged poles. ComEd does not allow this practice for its own facilities and it does not allow it for other entities either.⁴⁷⁹

Crown Castle 175: *Crown Castle and ComEd have not been able to resolve their current and on-going disputes regarding the red tag issues or ComEd's failure to act on applications within the Commission's timeframes.*

ComEd Answer: ComEd admits the parties have not resolved their dispute. ComEd denies that ComEd has failed to meet the Commission's timeframes because those timeframes did not apply in Illinois. For the reasons explained in ComEd's Affirmative Defenses, ComEd denies that FCC make-ready deadlines and other rules have applied to Crown Castle's attachments to ComEd's poles in Illinois. The July 15 Bureau Order ruled that the FCC had jurisdiction over this Complaint, which has now caused ComEd to reexamine the applicability of FCC make-ready deadlines and other rules. Prior to that time, ComEd (and indeed Crown Castle) operated consistent with ICC jurisdiction, recognizing the ICC had jurisdiction.

III. INFORMATION DESIGNATION

The following individuals are believed to have first-hand knowledge of the facts alleged in this Answer:

Michael S. Mann
Manager, New Business CIPA
Commonwealth Edison Company
2 Lincoln Centre
Oakbrook Terrace, IL 60181
630-437-2382
See attached Declaration for description of facts within such person's knowledge.

Sarah S. Herrera
Senior Business Analyst
Commonwealth Edison Company
2 Lincoln Center
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See attached Declaration for description of facts within such person's knowledge.

Patrick Arns
Manager of Distribution Standards
Commonwealth Edison Company
2 Lincoln Center
Oakbrook Terrace, IL 60181
312-848-1506

⁴⁷⁹ Arns Declaration at ¶19.

PUBLIC VERSION

See attached Declaration for description of facts within such person's knowledge.

Daryl G. Richardson
Operations Coordinator
Commonwealth Edison Company
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630-576-7029

See attached Declaration for description of facts within such person's knowledge.

David D'Hooge, PE
Principal Engineer
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Peter Tyschenko
Director, Distribution Engineering
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Joe Gilchrist
Manager, Real Estate & Facilities
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630-576-6396

See attached Declaration for description of facts within such person's knowledge.

Bradley R. Perkins
Assistant General Counsel, Regulatory
Exelon Corporation
10 S. Dearborn Street
Chicago, IL 60603
312-394-2632

Mr. Perkins has general knowledge of the facts within this Answer.

Martín Montes
Director, Regulatory Affairs
Commonwealth Edison Company
3 Lincoln Centre

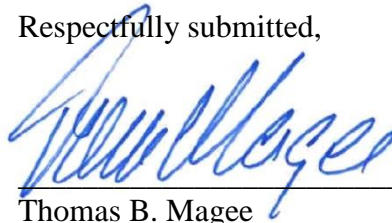
Oakbrook Terrace, IL 60181
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See attached Declaration for description of facts within such person's knowledge.

IV. CONCLUSION

WHEREFORE, ComEd respectfully requests that the Commission deny Crown Castle's Complaint for the reasons stated herein.

Respectfully submitted,



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